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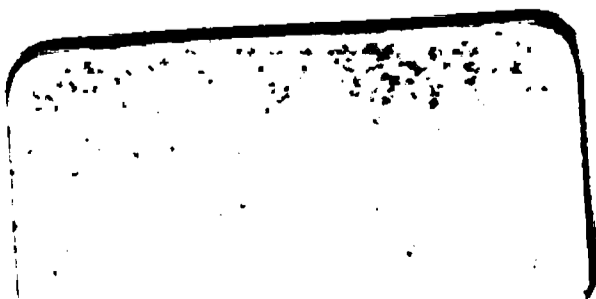
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THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.**

COMPILED AND ANNOTATED

BY A. C. FREEMAN,

**COUNSELLOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENTS,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.,**

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VOL. LIV.

The cases re-reported in this Volume will be found originally reported in the following State Reports:

HUMPHREYS' TENNESSEE REPORTS.	- - -	Vol. 11.	1850, 1851.
VERMONT REPORTS.	- - - - -	Vols. 22, 23.	1849, 1850.
GRATTAN'S VIRGINIA REPORTS.	- - - -	Vol. 7.	1850.
PINNEY'S WISCONSIN REPORTS.	- - - -	Vols. 2, 3.	1850.
CHANDLER'S WISCONSIN REPORTS.	- - - -	Vols. 2, 3.	1850.
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ARKANSAS REPORTS.	- - - - -	Vols. 11, 12.	1851.
CALIFORNIA REPORTS.	- - - - -	Vol. 1.	1851.
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FLORIDA REPORTS.	- - - - -	Vol. 4.	1851.
GEORGIA REPORTS.	- - - - -	Vols. 9, 10.	1851.
ILLINOIS REPORTS.	- - - - -	Vols. 12, 13.	1851.
INDIANA REPORTS.	- - - - -	Vols. 2, 3.	1851.
G. GREENE'S IOWA REPORTS.	- - - -	Vol. 3.	1851.
B. MONROE'S KENTUCKY REPORTS.	- - -	Vol. 12.	1851, 1852.
LOUISIANA ANNUAL REPORTS.	- - - -	Vol. 6.	1851.
MAINE REPORTS.	- - - - -	Vols. 32, 33.	1851, 1852.
MARYLAND REPORTS.	- - - - -	Vol. 1.	1851, 1852.
CUSHING'S MASSACHUSETTS REPORTS.	- - -	Vols. 7, 8.	1851.

AMERICAN DECISIONS.

VOL. LIV.

CASES REPORTED.

NAME.	SUBJECT.	REPORT.	PAGE.
Allen v. Center Valley Co.....	Partnership.....	21 Connecticut....	333
Allen v. Thomason.....	Infancy.....	11 Humphreys....	55
Ballance v. Rankin.....	Ejectment.....	12 Illinois.....	412
Ballard v. Russell.....	Married women... ..	33 Maine.....	620
Barnes v. Harris.....	Attorney and client..	7 Cushing.....	734
Barton v. Faherty.....	Sales.....	3 G. Greene.....	503
Bassett v. Carleton.....	Statutes.....	32 Maine.....	605
Batterton v. Chiles.....	Ejectment.....	12 B. Monroe.....	539
Beall v. Hilliary.....	Ex'rs and admin'rs..	1 Maryland.....	649
Benaway v. Bond.....	Justice's judgment..	2 Pinney; 2 Chand.	147
Benson v. Monroe.....	Taxation.....	7 Cushing.....	716
Berry v. Hamilton.....	Ex'rs and admin'rs..	12 B. Monroe.....	515
Beverly v. Burke.....	Adverse possession..	9 Georgia.....	351
Bigelow v. Kellar.....	Indorsements.....	6 Louisiana Ann..	555
Blann v. Crocheron.....	Trespass.....	19 Alabama.....	203
Borden v. State.....	Judgm's—jurisdict'n	11 Arkansas.....	217
Bryan v. Glass.....	Public lands.....	6 Louisiana Ann..	576
Bulloch v. State.....	Criminal law.....	10 Georgia.....	369
Bush v. Sullivan.....	Licenses.....	3 G. Greene.....	506
Byers v. Fowler.....	Circuit courts.....	12 Arkansas.....	271
Camp v. Grant.....	Partnership.....	21 Connecticut....	321
Campbell v. Race.....	Trespass.....	7 Cushing.....	729
Carmouche v. Bouis.....	Homicide.....	6 Louisiana Ann..	558
Carson v. Allen.....	Garnishment.....	2 Pinney; 2 Chand.	148
City of Lexington v. Milton.....	Corporations.....	12 B. Monroe.....	522
City of Madison v. Ross.....	Public improvements.	3 Indiana.....	481
Coffin v. Dunham.....	Marr'ge and divorce..	8 Cushing.....	769
Coker v. Birge.....	Nuisances.....	9 Georgia.....	347
Commonwealth v. Milton.....	Corporations.....	12 B. Monroe.....	522
Cox v. Bailey.....	Stat. of limitations..	9 Georgia.....	358
Craig v. Godfroy.....	Auctions.....	1 California.....	299

NAME.	SUBJECT.	REPORT.	PAGE.
Davis v. Lane.....	<i>Judgments</i>	2 Indiana.....	458
Dennett, Petitioner.....	<i>Constitutional law</i> ..	32 Maine.....	602
Dennis v. Chapman.....	{ <i>Declarations and admissions.</i> }	19 Alabama.....	186
Dial v. Hair.....	<i>Specific perform'ce.</i>	18 Alabama.....	179
Doe ex dem. Hosier v. Hall.....	<i>Executions</i>	2 Indiana.....	460
Dord v. Bonnaffée.....	<i>Conflict of laws</i>	6 Louisiana Ann..	573
Doss v. Campbell.....	<i>Marriage</i>	19 Alabama.....	198
Dugas v. Mathews.....	<i>Judgments</i>	9 Georgia.....	361
Emanuel v. Bird.....	<i>Partnership</i>	19 Alabama.....	200
Evans v. Governor.....	<i>Executions</i>	18 Alabama.....	172
Felton v. Deall.....	<i>Ferries</i>	22 Vermont.....	61
First Parish in Sherburne v. Flake.	<i>Assessors</i>	8 Cushing.....	755
Fisher v. Salmon.....	<i>Agency—guaranty</i> ..	1 California.....	297
Floyd v. State.....	<i>False imprisonment</i> ..	12 Arkansas.....	250
Frederick v. Youngblood.....	<i>Deeds</i>	19 Alabama.....	209
Gallinger v. Pomeroy.....	<i>Assignment</i>	3 G. Greene.....	496
Garretson v. Vanloon.....	<i>Time</i>	3 G. Greene.....	492
Getty v. Rountree.....	<i>Warranty</i>	2 Pinney; 2 Chand.	138
Glendale Woolen Co. v. Protec- tion Ins. Co.	{ <i>Insurance</i>	21 Connecticut....	309
Griffith v. Buffum.....	<i>Partnership</i>	22 Vermont.....	64
Hall v. Savill.....	<i>Mortgages</i>	3 G. Greene.....	485
Hamilton v. Summers.....	<i>Partnership</i>	13 B. Monroe.....	509
Hazelton v. Putnam.....	<i>Licenses</i>	3 Pinney; 3 Chand.	158
Heard v. Pierce.....	<i>Grand jury</i>	8 Cushing.....	757
Hemphill v. City of Boston.....	<i>Dedication</i>	8 Cushing.....	749
Hoddy v. Hoard.....	<i>Deeds</i>	2 Indiana.....	456
Hosier v. Hall.....	<i>Executions</i>	2 Indiana.....	460
How v. Kane.....	<i>Partnership</i>	2 Pinney; 2 Chand.	152
Howey v. Goings.....	<i>Partition</i>	13 Illinois.....	427
Hubgh v. N. O. & O. R. R. Co.	<i>Master and servant</i> ..	6 Louisiana Ann..	565
Huner v. Doolittle.....	<i>Interest</i>	3 G. Greene.....	489
Hsley v. Merriam.....	<i>Bankr'y and insol'ry</i> .	7 Cushing.....	721
Innis v. Steamer Senator.....	<i>Collisions</i>	1 California.....	305
Johnson v. Williams.....	<i>Necessaries</i>	3 G. Greene.....	491
Jones v. Robinson.....	<i>Neg. instruments</i> ..	11 Arkansas.....	212
Jones Mfg. Co. v. M. Mut. F. I. Co.	<i>Insurance—Fire</i>	8 Cushing.....	742
Kenney v. Greer.....	<i>Jurisdiction</i>	13 Illinois.....	439
King v. Robinson.....	<i>Insanity</i>	33 Maine.....	614
King v. State Mut. Fire Ins. Co.	<i>Mortgages</i>	7 Cushing.....	683
Kirkman v. Handy.....	<i>Nuisances</i>	11 Humphreys....	45
Knox v. Steele.....	<i>Writs of error</i>	18 Alabama.....	181
Lawton v. Fitchburg R. R. Co.	<i>Fences</i>	8 Cushing.....	753
Lewis & Co. v. Bakewell.....	<i>Protest</i>	6 Louisiana Ann..	561

CASES REPORTED.

9

NAME.	SUBJECT.	REPORT.	PAGE.
Lexington, City of, v. Milton.....	<i>Corporations</i>	12 B. Monroe.	522
Lovejoy v. Albee.....	<i>Jurisdiction</i>	33 Maine.	630
Lowremore v. Berry.....	<i>Trover</i>	19 Alabama.	188
Madison, City of, v. Ross.....	<i>Public improvements</i> . 3	Indiana.....	481
Marcy v. Stone.....	<i>Lost deeds</i>	8 Cushing.....	736
Marsh v. Billings.....	<i>Common carriers</i> ... 7	Cushing.....	723
May v. Breed.....	<i>Conflict of laws</i> 7	Cushing.....	700
McCravey v. Remson.....	<i>Estoppel</i>	19 Alabama.....	194
McDonald v. Wilkie.....	<i>Executions</i>	13 Illinois.....	423
McJilton v. Love.....	<i>Judgments</i>	13 Illinois.....	449
McKinney v. Springer.....	<i>Contracts</i>	3 Indiana.....	470
McLellan v. Longfellow.....	<i>Privileged communications.</i> }	32 Maine.....	599
Merry v. Bostwick.....	<i>Executions</i>	13 Illinois.....	434
Metcalf v. Metcalf.....	<i>Decree nunc pro tunc</i> . 19	Alabama.....	190
Mitchell v. State.....	<i>False imprisonment</i> . 12	Arkansas.....	253
Moffatt v. Buchanan.....	<i>Executions</i>	11 Humphreys....	41
Montgomery v. Ship Abby Pratt.	<i>Shipping</i>	6 Louisiana Ann..	562
Morrow v. Hanson.....	<i>Consideration</i>	9 Georgia.....	346
Mount Vernon v. Dusouchett....	<i>Streets</i>	2 Indiana.....	467
Mudd v. Harper.....	<i>Neg. instruments</i> ... 1	Maryland.....	644
Mussey v. Scott.....	<i>Agency</i>	7 Cushing.....	719
Nelson v. Suffolk Ins. Co.....	<i>Collisions</i>	8 Cushing.....	770
Newhall v. Ireson.....	<i>Watercourses</i>	8 Cushing.....	790
Nichols v. Bellows.....	<i>Usury</i>	22 Vermont.....	83
Nicholson v. State.....	<i>Counterfeiting</i>	18 Alabama.....	168
Norris v. Breed.....	<i>Conflict of laws</i> 7	Cushing.....	700
Northrop v. Sanborn.....	<i>Neg. instruments</i> ... 22	Vermont.....	83
Palmer v. Dougherty.....	<i>Highways</i>	33 Maine.....	636
Parsons v. Copeland.....	<i>Lien</i>	33 Maine.....	628
Partridge v. Patten.....	<i>Estoppel</i>	33 Maine.....	633
Patterson v. D'Auterive.....	<i>Elections</i>	6 Louisiana Ann..	564
Paul v. Slason.....	<i>Trespass</i>	22 Vermont.....	75
People v. Skinner.....	<i>Jurisdiction</i>	13 Illinois.....	432
Perminter v. Kelly.....	<i>Conversion</i>	18 Alabama.....	177
Pierce v. Carleton.....	<i>Garnishment</i>	12 Illinois.....	405
Pike v. McDonald.....	<i>Judgments</i>	32 Maine.....	597
Piper v. Menifee.....	<i>Physicians</i>	12 B. Monroe.....	547
Pratt v. Jones.....	<i>Judgments</i>	22 Vermont.....	80
President and Trustees of Mount Vernon v. Dusouchett.	<i>Streets</i>	2 Indiana.....	467
Preston v. Drew.....	<i>Intoxicating liquors</i> .. 33	Maine.....	639
Price v. McDonald.....	<i>Notice</i>	1 Maryland.....	657
Pulcifer v. Page.....	<i>Accession</i>	32 Maine.....	582
Reese v. Steamer Mary Foley....	<i>Collisions</i>	6 Louisiana Ann..	557
Reid v. Strider.....	<i>Pleading and prac.</i> 7	Grattan.....	120
Reno v. Hogan.....	<i>Common carriers</i> 12	B. Monroe.....	513
Richards v. Meeka.....	<i>Executions</i>	11 Humphreys....	49

NAME.	SUBJECT.	REPORT.	PAGE.
Rigg v. Wilton.....	<i>Wills</i>	13 Illinois.....	419
Ritger v. Parker.....	<i>Easements</i>	8 Cushing.....	744
Robinson v. Cone.....	<i>Negligence</i>	22 Vermont.....	67
Rogers v. Hule.....	<i>New trial</i>	1 California.....	300
Skinner v. Deming.....	<i>Bank notes</i>	2 Indiana.....	463
Smith v. State.....	<i>Abortion</i>	33 Maine.....	607
Smith v. Thompson.....	<i>Negligence</i>	7 Grattan.....	126
Spofford v. True.....	<i>Vendor and vendee</i> ..	33 Maine.....	621
Spring v. Bourland.....	<i>Replevin</i>	11 Arkansas.....	243
St. Andrew's Bay Land Com- pany v. Mitchell.	<i>Corporations</i>	4 Florida.....	340
State v. Colvin.....		11 Humphreys.....	58
State v. Croteau.....	<i>Criminal law</i>	23 Vermont.....	90
State v. McCarty.....	<i>Indictments</i>	2 Pinney; 2 Chand.	150
State v. Smith.....	<i>Homicide</i>	32 Maine.....	578
State v. Williams.....	<i>Indictments</i>	19 Alabama.....	184
Stearns v. Dillingham.....	<i>Assumpsit</i>	22 Vermont.....	88
Swafford v. Whipple.....	<i>Covenant of seisin</i> ..	3 G. Greene.....	498
Sykes v. McRory.....	<i>Public lands</i>	10 Georgia.....	402
Waddell v. Glassell.....	<i>Parol evidence</i> ...	18 Alabama.....	170
Warren v. Edgerton.....	<i>Executions</i>	22 Vermont.....	66
Wassell v. Reardon.....	<i>Agency</i>	11 Arkansas.....	245
Watts v. Steele.....	<i>Parent and child</i> ...	19 Alabama.....	707
West v. Kelly.....	<i>Parol evidence</i>	19 Alabama.....	192
West v. Thornton.....	<i>Negligence</i>	7 Grattan.....	134
Weston v. Sampson.....	<i>Watercourses</i>	8 Cushing.....	764
White v. Flannigain.....	<i>Streets—injunctions</i> .	1 Maryland.....	668
Wilcoxon v. McGhee.....	<i>Public lands</i>	12 Illinois.....	409
Williams v. Herndon.....	<i>Executions</i>	12 B. Monroe.....	551
Winter v. Jones.....	<i>Constitutional law</i> ..	10 Georgia.....	379
Womack v. Smith.....	<i>Wills</i>	11 Humphreys.....	51
Worthy v. Johnson.....	<i>Stat. of limitations</i> ..	10 Georgia.....	393
Zeigler v. Scott.....	<i>Usury</i>	10 Georgia.....	395

CASES CITED.

	PAGE		PAGE
Abbott v. Abbott.....	521	Allison v. Bank.....	303
Abbott v. Allen.....	501	Allison v. Rheam.....	265, 266
Abbott v. Blossom.....	589	Allison v. Taylor.....	619
Abbott v. Booth.....	266	Almond v. Bonnell.....	418
Abbott v. Goodwin.....	595	Alsop v. Mather.....	203, 329
Ablett d. Glenham v. Skinner...	417	Alston v. Durant.....	718
Abney v. Kingsland.....	741	Alston v. Mechanics' etc. Ins. Co.	314, 315
Abrams v. Sheehan.....	667	Altamus, Case of.....	521
Absor v. French.....	728, 732, 733	Amelung v. Seekamp.....	674, 680
Adams v. Cosby.....	479	American Express Co. v. Patter-	269, 270, 271
Adams v. Freeman.....	265	son.....	
Adams v. Frothingham.....	584	American Ins. Co. v. Insley.....	787
Adams v. Hill.....	475	Ameriscoggin Bridge v. Bragg...	163
Adams v. Meyers.....	590, 591	Ames v. Miss. Boom Co.....	594
Adams v. Smith.....	597	Ames v. Northwestern Manufac-	698, 699
Adams v. Wildes.....	596	turers' Ins. Co.....	
Adamson v. Cummins.....	275	Anderson v. Roberts.....	286, 287
Addis v. Johnson.....	216	Andrew v. Newcomb.....	597
Addison v. Hack.....	167	Andrews v. Bell.....	133
Aderson v. Howard.....	596	Andrews v. Durant.....	587
Etna Ins. Co. v. Baker.....	698	Andrews v. Estes.....	720
Etna F. Ins. Co. v. Tyler.....	690	Andrews v. Partington.....	207
Agar v. Fairfax.....	430	Andrews v. Solomon.....	736
Aiken v. Kilburne.....	601	Andrews v. Sullivan.....	496
Akin v. Newell.....	259, 269	Annan v. Houck.....	646
Alcock v. Wilshaw.....	418	Anonymous.....	286, 287, 617, 619
Aldrich v. Husband.....	588	Anthony v. State.....	502
Aldrich v. Kinney.....	617	Applegate v. Mason.....	369
Alexander v. Ghiselin.....	660	Appleton v. Fullerton.....	795
Alexander v. Walter.....	357, 630	Appleton Iron Co. v. British Am.	699
Allegre v. Maryland Ins. Co.....	321	Ins. Co.....	
Allen v. Allen.....	130, 200	Archambault v. Galarneau.....	696
Allen v. Barkley.....	430	Armstrong v. Black.....	111
Allen v. Craig.....	205	Armstrong v. Campbell.....	131
Allen v. Crary.....	245	Armstrong v. McAlpin.....	595
Allen v. Center Valley Co.....	333, 338, 339	Armstrong v. Robertson.....	191
Allen v. Dunn.....	66	Armstrong v. Toler.....	356
Allen v. Dykers.....	316	Armstrong's Adm'r v. Keith....	119
Allen v. Gleason.....	266	Armsworthy v. Cheshire.....	466
Allen v. Goodnow.....	595	Arnold v. Commonwealth.....	174
Allen v. Greenlee.....	269	Arnold v. Mundy.....	769
Allen v. Merchants' Bank.....	217	Arnold v. Skaggs.....	304
Allen v. Sayward.....	635, 636	Arnold v. State.....	186
Allen v. Story.....	651	Arteaga v. Flack.....	267
Allen v. Watt.....	455	Arthur v. Broadnax.....	621
Allen v. Wells.....	330	Ashley v. Johnson.....	270
Allen v. Wheatley.....	205, 206	Ashmore v. Evans.....	134
Alley v. Adams.....	592	Aslin v. Parkin.....	547
Alley v. Deschamps.....	494	Atherton v. Brown.....	316
Allie v. Schmitz.....	417	Atterbury v. Knox.....	535

	PAGE		PAGE
Attorney General v. Burrige...	765	Barclay v. Howell's Lessee...	415, 418
Attorney General v. Cleaves....	48	Barden v. McKinnie	176
Attorney General v. Doughty....	48	Bargaman v. Clarke.....	132, 137
Attorney General v. Nichol...48,	350	Barhydt v. Valk.....	266, 269
Attorney General v. Parmeter...	766	Barkaloo v. Randall.....	243
Atwater v. Woodbridge.....	382	Barkalow v. Pfeiffer.....	480
Atwood v. Cobb	754	Barker, <i>Ex parte</i>	521
Auditor v. Woodruff.....	217	Barker v. Bates.....	767, 769
Aufricht v. Northrup	503	Barker v. Esty	87
Aurora Fire Ins. Co. v. Eddy ...	320	Barnard v. Eaton.....	595
Austin v. Bostwick	361	Barnes v. Barber.....	425
Austin v. Carter	768	Barnes v. Harris.....	736
Avery v. Stewart	321	Barnes v. Meads.....	296
Aycock v. Martin.....	393	Barnes v. Taylor.....	131
Ayer v. Ashmead.....	205	Barnes v. Viall.....	205, 265, 267
Aylesworth v. Brown	367	Barry v. Edgeworth.....	638
Babcock v. Gili.....	586	Barry v. Page.....	723
Babcock v. McCamant.....	455	Barthelemy v. Johnson.....	636
Backus v. Lebanon.	392	Bartholomew v. Yaw.....	402
Backus v. McCoy.....	500	Bartlett v. Peaslee	733
Badlam v. Tucker.....	554	Bartlett & Co. v. Jones.....	66
Bagby v. Harris	175	Bartlow v. Bond.....	402
Bagnell v. Broderick.....	404	Barton v. Williams	178
Bagott v. Orr.....	766	Basten v. Butler.....	144
Bailey v. Gentry.....	393	Batten v. Earnley.....	519
Bailey v. Miller	518	Batterman v. Pierce.....	144
Bailey v. Philadelphia, W. & B. R. R. Co.....	392, 643	Baughner v. Nelson.....	427
Bailey v. Wiggins.....	259	Baxter v. Little.....	217
Baker v. Barney	492	Baxter v. Portsmouth.....	619
Baker v. Mechanics' F. Ins. Co..	345	Baxter v. Sewell.....	667
Baker v. Wheaton.....	716	Baxter v. Tucker	82
Baker v. Wheeler.....	586	Bayley v. Greenleaf.....	286
Baldwin v. Baldwin.....	770	Bayley v. Onondaga etc. Ins. Co.	723
Baldwin v. Munn.....	500	Baylis v. Lawrence	112
Ballance v. Rankin	423	Baynard v. Norris.....	660, 661
Ballantine v. Golding	710	Beach v. Forsyth	592
Ballard v. Ballard Vale Co.....	748	Beach v. Schmultz.....	592
Ballou v. Talbot.....	721	Beals v. Lee.....	619
Balt. etc. R. R. Co. v. Faunce ..	718	Bean v. Crosby.....	264, 267
Bank v. Evans.....	439	Beard v. White.....	193
Bank of Alexandria v. Patton...	125	Beardsley v. Hill	85
Bank of Exeter v. Sullivan.....	360	Beatty v. Gregory	508
Bank of Metropolis v. Gutschlick	343, 344	Beaubien v. Brinckerhoff....	443, 444
Bank of Pittsburgh v. Whitehead	119	Bebee v. Steel.....	269
Bank of Rockville v. Nat. B'k of Lafayette	85	Bechinal v. Arnold.....	287
Bank of Rome v. Curtiss.....	175	Becker v. Hecker.....	479
Bank of U. S. v. B'k of Washing- ton.....	454	Beckford v. Wade	130
Bank of U. S. v. Deveaux	535	Beckwith v. Bean.....	262
Bank of U. S. v. Moss	232	Becquet v. McCarthy	631
Bank of U. S. v. Winston.....	280	Beebe v. De Baun	244, 245
Bank of Utica v. Bender.....	648	Beecher v. Buckingham	657
Bank of Utica v. Mersereau	601, 636, 736	Beecher v. Parmele	741
Bank of Vergennes v. Warren ..	368	Beecher v. Stevens.....	338
Bank of Virginia v. Craig.....	123	Beeler's Heirs v. Bullett's Heirs.	275, 276
Banks v. Brown	503	Beers v. St. John	589
Barbee v. Armstead.....	167	Beeton v. Ferguson	368
Barber v. Brace.....	316	Beitz v. Fuller	360
Barber v. State.....	269	Belchier v. Kenforth.....	287
		Belden v. Seymour	502, 503
		Belknap v. Cram.....	326
		Belknap v. Gleason	250
		Bell v. Locke.....	727
		Bell v. Morrison.....	360

CASES CITED.

13

	PAGE		PAGE
Bell v. Newman	329	Blofield v. Payne.....	727
Bell v. Scammon.....	638	Blood v. Enos.....	479, 480
Bell v. Western etc. Ins. Co....	693	Bloom v. Burdick.....	357, 447
Bellamy v. Woodson.....	466	Bloom, <i>In re</i>	595
Bellas v. Hays.....	496	Bloss v. Plymale.....	205
Bemus v. Howard	550	Blount v. Burrow.....	287
Bender v. Fromberger.....	500	Bluett v. Osborne.....	142, 143
Benedict v. Lynch.....	496	Blumer v. Phoenix Ins. Co.....	320
Benford v. Daniels.....	191	Blundell v. Catterall.....	765
Benjamin v. Benjamin.....	492	Blythe v. Tompkins... ..	263, 266, 271
Bennet v. Jenkins	500	Board of Police etc. v. Grant....	604
Bennett v. Buchan.....	368	Board of Trustees v. Mayer.....	470
Bennett v. Francis.....	89	Boardman v. Gore.....	303, 505
Bennett v. O'Fallon.....	492	Boas v. Updegrove.....	718
Benson v. Monroe.....	719	Boaz v. Tate.....	266, 270
Benson v. Musseter.....	417	Bodfish v. Fox.....	321
Bent v. Graves.....	433	Boilvin v. Edwards.....	441
Bercy v. Lavretta.....	130	Boisdere v. Citizens' Bank.....	393
Berry v. Hamill.....	269	Bolton v. Johns.....	503
Berry v. Harper.....	648	Bond, <i>Ex parte</i>	208
Berry v. Robinson.....	216	Bond v. Hopkins.....	130
Berry v. Willett.....	415	Bond v. Jones.....	401
Berthold v. Clay etc. Ins. Co....	699	Bondurant v. Buford.	176
Betts v. Lee	586	Bondurant v. Thompson.....	191
Beverley's Case.....	616, 617, 619	Bonesteel v. Bonesteel.....	265
Bibb v. Hebert.....	560	Bonnell v. Jacobs.....	146
Bigelow v. Hartford Bridge Co..	351	Boody v. Keating.....	303
Bigelow v. Stearns.....	441	Booker v. Gregory.....	402
Biggam v. Merritt.....	300	Boone v. Childs.....	130
Bimeler v. Dawson.....	243, 452	Boone v. Chiles.....	286, 289
Bingham v. Weiderwax.....	503	Boorman v. Jenkins.....	146, 321
Binnerman v. Weaver.....	518	Borden v. Fitch.....	441, 631
Bird v. Jones.....	260	Borden v. State.....	274
Birdsall v. Johnson	130, 132	Boren v. McGehee.....	83
Birge v. Gardner.....	74, 75, 469	Borrekins v. Bevan	143, 144, 146
Biscoe v. Jenkins.....	248	Borst v. Baldwin.....	369
Biscoe v. Sandefur.....	243	Bosanquett v. Dashwood.....	397
Bishop v. Dexter.....	216	Boss v. Litton.....	73
Bissell v. Briggs.....	631	Boston v. Richardson....	793
Bissell v. Gold.....	266, 267	Bound v. Lathrop.....	360
Bissell v. Kip.....	276	Boutelle v. Melendy.....	718
Bissell v. Loyd	130	Boutwell v. Thompson....	262
Bivins v. Lessee.....	393	Bowditch v. Balchin.....	268
Bivins v. McElroy.....	188	Bower v. State.....	582
Black v. Everett.....	368	Bowdoinham v. Richmond.....	393
Blair v. Chamberlain.....	438	Bowen v. Bell.....	502
Blair v. Perpetual Ins. Co.....	188	Bowles v. Sharp.....	415
Blake v. Williams.....	713	Bowman v. Wathen	131
Blakeslee v. Rossman.....	595	Bowman v. Wootton.....	519
Blakisly v. Johnson.....	368	Bowne v. Joy.....	453
Blanchard v. Atlantic Mut. F. Ins. Co.....	700	Bowyer v. Hewitt.....	499
Blanchard v. Baker.....	794	Boyd v. Anderson.....	505
Blanchard v. Brooks.....	489, 635	Boyle v. Agawam Canal Co....	480
Blanchard v. Equitable Safety Ins. Co.....	790	Boyleston v. Kerr.....	268
Blanchard v. Goss.....	270	Bracken v. Martin.....	133
Blanchard v. Russell... ..	706, 708, 716	Bracken v. Preston.....	681
Blanchard v. Williamson.....	131	Bradeen v. Brooks.....	625
Blaney v. Rice.....	211	Bradford v. Bradford.....	547
Blann v. Crocheron	205	Bradford v. Bush.....	183
Bledsoe v. Doe.....	418	Bradford v. Manly	140, 146
Blight's Heirs v. Banks.....	457	Bradley v. Burwell.....	329
Bliss v. Kennedy.....	412	Bradley v. Nashville Ins. Co....	787
		Brady v. Ball.....	205
		Brahan v. Ragland.....	368

	PAGE		PAGE
Brailey v. Southborough.....	731	Bruce v. Schuyler.....	393, 613
Brakely v. Tuttle.....	591	Bruen v. Ogden.....	245
Brakenridge v. Holland.....	592	Bruker v. Town of Covington..	469
Brandt v. Foster.....	505	Brumley v. State.....	243
Brushier v. Gratz.....	133	Brummagim v. Tillinghast.....	719
Brawner v. Franklin.....	671	Brundage v. Brundage.....	586
Brazier v. Ansley.....	190	Brunswick Sav. Inst. v. Commer-	
Breck v. Blanchard.....	427	cial Union Ins. Co.....	700
Bresee v. Stiles.....	417	Brush v. Aetna Ins. Co.....	699
Brewer v. Harris.....	299	Brushaber v. Stegeman.....	259, 270
Brewer v. Inhabitants of Tying-		Bryan v. Bates.....	268
ham.....	477	Bryan v. Earthman.....	53
Brewster v. Hammet...334, 337,	338	Bryant v. Hoskins.....	466
Brewster v. Hardeman.....	360	Bryant v. Pennell.....	597
Brewster v. Scarborough.....	443	Bryant v. Ware.....	594, 595
Brewster v. Vail.....	554	Brydon v. Campbell.....	668
Brewton v. Cannon.....	356	Buchan v. Sumner.....	158, 333
Bridge v. Grand Junction R. Co.		Buchanan v. Matlock.....	457
.....	71, 72	Buchanan v. Port.....	460
Bridge v. Johnson.....	367	Buchanan v. Rucker.....	633
Bridge v. Oakley.....	564	Buck v. Holloway.....	134
Bridgewater v. Gordon.....	55	Buckley v. Gross.....	591
Briggs v. B'k of Nantucket.....	447	Bucknam v. Bucknam.....	792
Bright v. Eynon.....	356	Buckworth v. Buckworth.....	208
Brighton Market B'k v. Merick.	723	Budd v. Brooke.....	411
Briley v. Sugg.....	599	Buddington v. Bradley.....	794, 795
Brinley v. Mann.....	298	Bullard v. Copps.....	211
Brinsfield v. Carter.....	386	Bullard v. Harrison....	728, 732, 734
Brinsmead v. Harrison.....	205	Bullock v. Wilson.....	388
Brisbane v. Dacres.....	717	Bunton v. Davis.....	145
Brisbin v. Newhall.....	368	Burdick v. Norris.....	418
Britton v. Turner.....	479, 480	Burgiven v. Hostler's Adm'rs...	203
Broadwell v. Lair.....	401	Burlace v. Cooke.....	287
Broadwell v. Swigert.....	306, 558	Burleigh v. Stott.....	360
Brock v. Stimson.....	268	Burlingham v. Wylee.....	264
Brockman v. McDonald.....	427	Burrage's Lessee v. Beardaley...	503
Brodie v. Rutledge.....	229	Burritt v. Saratoga Co. Mut. F.	
Brogan v. Savage.....	418	Ins. Co.....	320
Bronson v. Coffin.....	754	Burrows v. Jemino.....	239
Brooks v. Ashburn.....	205	Burson v. Blair.....	368
Brooks v. Lyon.....	304	Burtis v. Cook.....	363
Brookshire v. Brookshire.....	490	Bartus v. Tisdall.....	335
Brown's Estate.....	521	Bush v. Bradford.....	183
Brown, <i>Ex parte</i>	653, 764	Bush v. Bush.....	638
Brown v. Bartlett.....	191	Bushell's Case.....	99, 102, 105, 106
Brown v. Burkenmeyer.....	682	Busk v. Royal Exchange Assur-	
Brown v. Chadbourne.....	795	ance Co.....	779
Brown v. Chadsey.....	259, 270	Butler, <i>In re</i>	131
Brown v. Combs.....	416	Butterfield v. Forrester...70, 71,	73
Brown v. Commonwealth.....	553	Butterworth v. O'Brien.....	401
Brown v. Crowl.....	265	Byers v. Fowler.....	243
Brown v. Forer.....	438	Byxbie v. Wood.....	367
Brown v. Hobson.....	657		
Brown v. Maxwell.....	469, 573	Cable v. Cooper.....	230
Brown v. McIntosh.....	401	Cahaba v. Burnett.....	718
Brown v. McKinally.....	717, 718	Cairo etc. R. Co. v. Hindman...	409
Brown v. Toell's Adm'r.....	466	Caldwell v. Knott.....	48
Brown v. Tuthill.....	488	California v. Poulterer.....	607
Brown v. Williams.....	286	California Furniture Co. v. Hal-	
Brown v. Wooton.....	205	sey.....	338
Browne v. Hobson.....	657	Callen v. Ferguson.....	133
Browne v. Kennedy.....	769	Camden v. Haskill.....	418
Browning v. Estes.....	357	Cameron v. Rich.....	564
Brownsword v. Edwards.....	397	Cameron v. The Justices.....	657

CASES CITED.

15

	PAGE		PAGE
Camp v. Grant	338	Chandelor v. Lopus	140
Campbell's Appeal	369	Chandler v. De Graff	594
Campbell v. Ewalt	264	Chandler v. Sanger	719
Campbell v. Hicks	133	Chanet v. Parker	205
Campbell v. Hughes	125	Chapin v. Scott	415, 416
Campbell v. Mullett	335	Chapman v. Commonwealth	378
Campbell v. New England etc. Ins. Co.	743, 744	Chapman v. Glassell	667
Campbell v. Phelps	204	Chapman v. Holding	417
Campbell v. Price	123	Chapman v. Kimball	584
Campbell v. State	264	Chapman v. Thames Mfg. Co.	80
Canning v. Williamstown	731	Chappell v. Cox	593
Caperton v. Ballard	263	Chardon v. Oliphant	360
Caperton v. Bowyer	262	Charles v. Haskins	397
Caperton v. Martin	262	Charles River Bridge v. Warren Bridge	410
Caperton v. Nickel	262	Chase v. Fish	266
Carew v. Rutherford	719, 727	Chase v. Washburn	587, 592
Carey v. Rae	732, 733	Chatham v. Brainerd	792
Carey v. Sheets	269	Cheale v. Cheale	770
Carlisle v. Holton	558	Cheriot v. Barker	316
Carlisle v. Ramsey	458	Chesapeake etc. Canal Co. v. Young	682
Carlton v. Conroy	593	Chess' Appeal	496
Carmichael v. Bank	217	Chewning v. Johnson	715
Carney v. Carney	50	Cheyney's Case	404
Carnochan v. Gould	145	Chichester v. Phillips	99
Carow v. Mowatt	521	Child v. Gratiot	521
Carpenter v. Natoma Water & Mining Co.	545	Child v. Morley	359
Carpenter v. Parker	262, 271	Chilton v. L. & C. R. Co.	260
Carpenter v. Providence etc. Ins. Co.	691, 692, 693, 695, 697	Chisholm v. Chittenden	596
Carroll v. Lee	449	Chism v. Woods	505
Carroll v. Norwood	415, 417	Choimondeley v. Clinton	130, 131, 687
Carson v. Blazer	769	Choteau v. Jones	296, 668
Carson v. Phelps	668	Chrisman v. Carney	259
Carson's Lessee v. Bondinot	387	Christopher v. Cox	520
Carter v. Darby	198	Christy v. Pulliam	418
Carter v. Jones	457	Churchill v. Grove	287
Carter v. Moses	401	City Council v. Rogers	538
Carter v. Murcott	765	City of Evansville v. Decker	484
Carter v. Rockett	698	City Five-cent Sav. B'k v. Penn. F. Ins. Co.	700
Cartwright v. Chabert	448	Clapp v. Bromaghan	353
Cartwright v. Pultney	430	Clark v. Clark	440
Carvic v. Vickery	358	Clark v. Flint	400
Cary v. Daniels	795	Clark v. Hackett	619
Cary v. Gruman	144, 145	Clark v. Harkness	440
Case v. Coddling	304	Clark v. Henry	488
Casey's Lessee v. Inloes	45, 741	Clark v. Huber	418
Casley v. White	308	Clark v. Hunter	402
Casteel v. Casteel	492	Clark v. Mayor etc. of N. Y.	480
Castro v. De Uriarte	269	Clark v. Moss	368
Cathcart v. Bowman	500	Clark v. New England etc. Ins. Co.	320
Catlin v. Springfield Fire Ins. Co.	743	Clark v. Pinney	454
Catlin v. Valentine	349, 351	Clark v. Rowling	598
Caulson v. Walton	133	Clark v. Skinner	245
Cavan v. Stewart	633	Clark v. State	582
Chadwick v. Jeffers	217	Clark v. Stoughton	84, 85
Chalk v. Wyatt	48	Clark v. Thompson	418
Chamberlain v. Day	454	Clark v. Washington etc. Ins. Co.	696
Chamberlin v. Murphy	205	Clarke v. Cotton	653, 655
Champlin v. Butler	488	Clarke v. Dunham	619
Champlin v. Pendleton	792	Clarke v. Lott	430
Chancellor v. Wiggins	505	Clarke v. Sibley	687
Chancey v. Needham	249		

	PAGE		PAGE
Clarke's Lessee v. Courtney.....	720	Commonwealth v. Lightfoot.....	174
Clarkson v. Garland.....	399, 402	Commonwealth v. Loud.....	60
Clason v. Morris.....	287	Commonwealth v. McGowan....	250
Clawson v. Eichbaum.....	488	Commonwealth v. Parker.....	
Clay v. Fry.....	466	.....582, 608, 609, 610,	614
Clay v. White.....	415, 418	Commonwealth v. Pemberton. .	582
Clayton v. Scott.....	267	Commonwealth v. Porter	93, 111
Clealand v. Walker.....	720	Commonwealth v. Richards.....	373
Clement v. Durgin.....	163	Commonwealth ex rel. Claghorn	
Clendennen v. Paudsel.....	479	v. Cullen.....	668
Cleveland v. Welch.....	447	Comstock v. Draper.....	648
Clifton v. Grayson.....	265	Comstock v. Smith.....	635
Clinton v. Nelson.....	266	Concklin v. Havens.....	585
Clow v. Wright.....	262	Concord etc. Ins. Co. v. Wood-	
Clubine v. McMullen.....	546	bury.....	696, 697
Coalter v. Hunter.....	794	Cone v. Niagara F. Ins. Co.	699
Coates v. Holbrook.....	727	Conner v. Myers.....	402
Coates v. Penn. F. Ins. Co.....	699	Conrad v. Atlantic Ins. Co.....	278
Cochran v. Toher.....	270	Conrad v. Joseph Uhrig Brewing	
Coddington v. R. R. Co.....	130, 131	Co.....	727
Codman v. Winslow.....	767	Constable's Case.....	768
Coe v. Smith.....	479	Continental Ins. Co. v. Huffman..	700
Coffin v. Knott.....	427	Conyers v. Kenan.....	357
Coggshall v. Green.....	520, 522	Cook v. Addison.....	592
Coit v. Commercial Ins. Co.....	321	Cook v. Boston.....	719
Colburn v. Mason.....	741	Cook v. Fountain.....	43
Colburn v. Richards.....	793	Cook v. Hull.....	793
Colcock v. Butler.....	133	Cook v. Stearns.....	161, 163
Cole v. Goodwin.....	515	Cook v. Steuben Co. B'k.....	499
Cole v. Irvine.....	414	Coope v. Lowerre.....	521, 522
Cole v. Radcliff.....	262	Cooper v. Adams.....	263, 267
Coleman v. Cocke.....	280	Cooper v. Whitney.....	488
Coleman v. Dobbins.....	466	Cooper v. Williams.....	794
Collard v. Del. L. & W. R. Co...	205	Copley's Lessee v. Riddle.....	387
Collin v. Collin.....	55	Cordell v. State.....	466
Collins v. Benbury.....	769	Corfield v. Coryell.....	529
Collins v. Jones.....	466	Cornell v. Gallagher.....	521
Collins v. Loftus.....	45	Cornpropst's Appeal.....	521
Collins v. Spears.....	521	Cortelyou v. Van Brundt.....	321
Collins v. Torry.....	489	Corwin v. Moorhead.....	588
Collins v. Van Dever.....	134	Cosby v. Adams.....	479
Colt v. Barnard.....	215, 648	Cotterill v. Starkey.....	71
Colter v. Lower.....	259	Cottrell v. Varnum.....	150
Columbia Ins. Co. v. Lawrence..		Coughman v. Drafts.....	401
.....685, 698,	799	Coulter's Case.....	293
Colwell v. Miles.....	132	Coupal v. Ward.....	265
Colwill v. Reeves.....	592	Course v. Shackelford.....	216
Comeggs v. Vasse.....	367	Courthope v. Mapplesden.....	675
Comer v. Knowles.....	270, 271	Coutts v. Walker.....	280
Comins v. Newton.....	588	Cowry v. Lewis.....	401
Commissioners v. Gansett.....	492	Cox v. Nelson.....	275
Commissioners of Kensington v.		Coyles v. Hurtin.....	267
Wood.....	483	Cragin v. Carleton.....	629
Commonwealth v. Anthes.....	119	Craig v. Leiper.....	134
Commonwealth v. Bailey.....	769	Craig v. Martin.....	496
Commonwealth v. Bangs.....	609	Craig v. Taylor.....	418
Commonwealth v. Bannon.....	763	Cramer v. Van Alstyne.....	275
Commonwealth v. Chapin.....	769	Cranstown v. Johnston.....	287
Commonwealth v. Cummings....	119	Cravens v. Duncan.....	368
Commonwealth v. Eastman.....	512	Creager v. Brengle.....	599
Commonwealth v. Genther.....	756	Crenshaw v. State.....	614
Commonwealth v. Kimball.....	642	Crisler v. Garland.....	601, 736
Commonwealth v. Knapp.....	111	Crockett v. Lashbrook.....	546
Commonwealth v. Kneeland....	111	Croft v. Day.....	727

	PAGE		PAGE
Cromack v. Heathcoat.....	601	Den d. Burges v. Purvis	415, 417
Crooker v. Bragg.....	794	Den d. Meredith v. Andres	741
Crosby v. Baker.....	596	Den d. Shrew v. Jones.....	278, 280
Cross v. Carson.....	628	Den d. Skinner v. Cox.....	488
Cross v. Guthery.....	551	Denn v. Morrell.....	302
Cruss v. Mann.....	88	Dennis v. Chapman	176, 188
Cruss v. Martin.....	586	Dennis v. Dennis	616
Crozier v. Kirker.....	513	Denton v. McKenzie.....	45
Cruikshank v. Gardner.....	426	Deputy v. Tobias.....	304
Culbreath v. Culbreath.....	719	Derby Turnpike Co. v. Parks ...	
Culver v. Blake.....	550	.....	382, 393
Cunningham v. Freeborn.....	576	Desha v. Holland.....	158, 321
Cunningham v. Irwin.....	492	Despatch Line v. Bellamy Mfg.	
Currier v. Gale.....	741	Co.....	345, 720
Curry v. Pringle.....	265	De Vaux v. Salvador.....	
Curtis v. Francis.....	748	.....	783, 785, 787, 788
Curtis v. Groat.....	586	Devaynes v. Noble.....	328
Cushing v. Breed.....	590	Develing v. Sheldon.....	265
Cutler v. Howard.....	518	Deversey v. Johnson.....	592
Cutler v. Powell.....	146	Devlin v. Mayor.....	367
Cutts v. Hardel.....	393	Devoe v. Davis.....	265
Cuyler v. Ferrill.....	431	Dewdney, <i>Ex parte</i>	130
		De Wolf v. Capital City Ins. Co.	694
Dabney v. Manning.....	455	Dey v. Dunham.....	399, 488
Dahlgren v. Duncan.....	324	Deyo v. Van Valkenburg.....	265
Danforth v. Durell.....	752	Dezell v. Odell.....	196, 198, 554, 630
Daniel v. Nelson.....	512	Dick v. Franklin F. Ins. Co.....	
Danley v. Rector.....	190	.....	696, 697, 698
Dargan v. Waddill.....	46, 351	Dickerman v. Burgess.....	131
Darling v. Bryant.....	741	Dickerson v. Talbot.....	416
Dart v. Dart.....	635	Dickey v. Malechi.....	457
Dartmouth College v. Woodward.	387	Dickinson v. Hall.....	347
Davenport v. Foulke.....	595	Diehl v. Friester.....	265
Davenport v. Karnes.....	438	Dietrichs v. Schaw.....	268
Davies v. Mann.....	71, 72	Dillingham v. Smith.....	592
Davis v. Bush.....	266	Dimick v. Brooks.....	82
Davis v. Davis.....	770	Dimon v. Hazard.....	338
Davis v. Dodge.....	339	Dinsmore v. Bradley.....	723
Davis v. Howell.....	203, 333	Dinsmore v. Dinsmore.....	360
Davis v. Incoe.....	520	Dixon v. Clayville	648
Davis v. Marx.....	595	Dixon v. Hood	512
Davis v. Minor.....	393	Dixon v. Sadler.....	779
Davis v. Rainsford.....	637	Dobson v. Land.....	696, 698
Davis v. Robertson.....	300	Doe v. Baker.....	167
Davis v. Rowell.....	300	Doe v. Campbell.....	356
Davis v. Scott.....	206	Doe v. Reynolds.....	546
Davis v. Shuler.....	522	Doe v. Seaton	546
Davis v. Smith.....	455, 460, 500	Doe d. Bowman v. Lewis.....	415
Davis v. Whitesides.....	415, 416	Doe d. Bright v. Stevens.....	545, 546
Dawes v. Head.....	713	Doe d. Bryant v. Wipple.....	416
Dawley v. Van Court	418	Doe d. Coyle, Clerk, v. Cole....	416
Day v. Commonwealth	517	Doe d. Fishar v. Prosser.....	356
Day v. Cummings	88, 402	Doe d. Hellyer v. King.....	416, 418
Day v. Porter.....	205	Doe d. Kennedy's Heirs v. Rey-	
Dean of St. Asaph's Case.....		nolds.....	545
.....	102, 106, 108, 110, 116	Doe d. Moore v. Abernathy.....	416
De Bruhl v. Parker.....	205	Doe d. Morgan v. Morgan	638
De Chastellux v. Fairchild.....	604	Doe d. Raper v. Lonsdale	416
Decordona v. Smith.....	133	Doe d. Rowlanson v. Wainwright.	416
Deerfield v. Arms.....	584	Doe d. Starke v. Gildart.....	276
De Forest v. Fulton Ins. Co.....	687	Doherty v. Munson	264
Defreeze v. Trumper.....	504, 505	Dolan v. Buzzell.....	613
Dehon v. Foster	715	Dole v. Olmstead.....	590
Den d. Bowyer v. Judge.....	416	Domina Regina v. Barnaby.....	231

	PAGE		PAGE
Donahoe v. Shed	266	Edwards v. McKee	457
Donnell v. Jones.....	179, 607	Egberts v. Wood	203
Donovan v. Finn.....	466	Eisbank v. Hampton	134
Dooly v. Stipp.....	402	Elder v. Morrison.....	254
Dorsey v. Jackman	505	Elderkin v. Spurbeck	433
Doscher v. Blackiston.....	588	Eldred v. Hazlett.....	369
Doss v. Commonwealth	111	Eldridge v. Rowe.....	479, 480
Doub v. Barnes.....	402	Ellicott v. Nichols.....	512
Doubleday v. Makepeace.....	304	Elliot v. Porter.....	205
Douglas v. Forrest	226, 631	Elliott v. Abbott	345
Douglass v. Massie.....	243	Elliott v. Thompson.....	500
Dow v. Eyster.....	492	Ellis v. Jameson.....	629
Downer v. South Royaltan B'k..	368	Ellison v. Dove.....	478
Downman's Case.....	97	Elmendorf v. Taylor.....	130
Downs v. Planters' Bank.....	217	Elmore v. Fitzpatrick.....	585
Doyle v. Dixon.....	727	Ellsworth v. Caldwell.....	368
Dozier v. Duffee.....	210	Ely v. Ely	696
Drake v. Drake.....	449	Emans v. Turnbull.....	584
Drake v. Green.....	519	Embrey v. Owen.....	793
Drennan v. People.....	268	Emerson v. Bowers	520
Drexler v. Tyrrell.....	181	Emerson v. Brigham	145
Dubois v. Baum.....	133	Emerson v. Fick.....	622
Du Bose v. Marx.....	205	Emerson v. Sansome	546
Duchess d'Orleans, In the Goods		Emerson v. Taylor.....	584
of.....	521	Emerson v. Udall.....	455, 467
Duchess of Kingston's Case.....	196, 236	Emerson v. Wiley.....	673
Dudley v. Dudley.....	287	Emery v. Hapgood.....	265
Dudley v. Lindsey.....	460	Emery v. Huntington	787
Dugan v. Gittings	400	English v. Foxall.....	289
Duggan v. King.....	648	English v. McNair.....	518
Duke de Cadaval v. Collins.....	718	English v. Tomlinson.....	43
Dunbar v. Hallowell.....	449	Episcopal Ch. v. Wiley.....	300
Duncamban v. Stint.....	519	Epperly v. Bailey.....	478
Duncan v. Bloomstock.....	367	Erwin v. Commercial and Rail-	
Duncan v. Spear.....	190	road Bank	150
Duncan v. Sylvester.....	769	Erwin v. Maxwell.....	145
Duncombe's Case.....	732	Erwin v. Sanders	194
Dunham v. Lamphere.....	769	Estes v. State	378
Dunham v. Wyckoff	245	Etting v. Bank of United States.	356
Dunlop v. Avery.....	699	Evans v. Browne.....	466
Dunlop v. Ball.....	356	Evans v. Crosier.....	441
Dunning v. Stearns	588	Evans v. Fearne.....	490
Duran v. Sage.....	134	Evans v. McLucas.....	588
Dwight v. Rice.....	564	Evans v. Merreweather.....	794, 795
Dwinel v. Barnard.....	795	Evans v. State Bank.....	188
Dyer v. Sanford.....	164, 167	Evans v. Tatem.....	460
Dyer v. Smith.....	263, 264	Evansville etc. R. R. v. Hiatt...	470
Eager v. Atlantic Ins. Co.....	320	Evarts v. Dunton	416
Eanes v. State.....	267, 268	Everett v. Lusk	415
Earl Cowper v. Baker.....	675	Everett v. United States.....	345
Earle v. De Witt	723	Everitt v. Chapman.....	65
East India Co. v. Keighly	289	Ewer v. Coffin.....	455, 633
East St. Louis v. Hackett	418	Ewing v. French.....	588
Eaton v. Lynde.....	586	Exall v. Partridge	359
Eaton v. Whiting.....	489	Excelsior Fire Ins. Co. v. Royal	
Ecfert v. Des Coudres.....	556	Ins. Co.....	694, 695, 696, 697
Eddy v. Beach	269	Fairbairn v. Fisher.....	519
Eddy v. Wilson	499	Fairbanks v. Williamson ...	635, 636
Eddy St. Iron Foundry v. Hamp-		Fairfield v. Payne	80
ton etc. Ins. Co.....	320	Fairman v. Ives.....	112
Edmonds v. Crenshaw.....	650	Falls v. Carpenter.....	134
Edmonds v. Montgomery.....	367	Fanning v. Dunham.....	397
Edwards v. Handley.....	466	Ferguson v. Mahon	239

CASES CITED.

19

	PAGE		PAGE
Farmers' etc. Bank v. Chester...	756	Floyd v. State.....	254, 259, 265
Farmers' Ins. and L. Co. v. Snyder	314	Flynn v. H. R. R. Co.....	367
Farmers' and Mechanics' Bank v.		Fobes v. Shattuck.....	591, 597
Little.....	150	Foliamb's Case.....	763
Farnsworth v. Chase.....	321	Foot v. Stevens.....	447
Farnum v. Platt.....	734	Foot v. Wiswall.....	356
Farnum v. Town of Concord....	468	Foot v. Stevens.....	239
Farrar v. Stackpole.....	321	Force v. Probasco.....	261
Farrelly v. City of Cincinnati...	469	Ford v. Stuart.....	367, 368
Farris v. Bennett.....	134	Fore v. Manlove.....	368
Farwell v. Meyer.....	401, 402	Forester v. Guard.....	304
Faure v. Winans.....	696	Forsythe v. Ellia.....	505
Fay v. Cheney.....	489	Fort v. Groves.....	682
Fay v. Lovejoy.....	401, 402	Fortenberry v. Frazier.....	125
Feaster v. Fleming.....	455	Foster v. Equitable Ins. Co.....	695
Featherstonhaugh v. Johnstone.	178	Foster v. Evans.....	546
Fellows v. Goodman.....	265	Foster v. Hall.....	735, 736
Penelon v. Butts.....	265	Foster v. Means.....	423
Fennings v. Lord Grenville.....	177	Foster v. Pettibone.....	587
Fentiman v. Smith.....	161, 163, 165	Foster v. Tucker.....	303
Fenwick v. Gill.....	418	Foster v. Van Reed....	694, 696, 697
Ferran's Estate.....	497	Fountain v. Young.....	736
Fessenden v. Willey.....	723	Fowke v. Slaughter.....	45
Field v. Nickerson.....	215	Fowler v. Lee.....	243, 445
Field v. People.....	763	Fowler v. Williams.....	146
Filbut v. Hawk.....	368	Fowley v. Palmer.....	693
Filley v. Phelps.....	334	Fox v. Phoenix Fire Ins. Co.....	696
Findlay v. Hoamer.....	332	Fox v. Taliaferro.....	402
Findlay v. Praitt.....	265	Fraley v. Bispham.....	145
Findlay v. State.....	582	Frame v. Dawson.....	166
Fiquet v. Allison.....	597	Frame v. Kenny.....	130, 131
First v. Miller.....	553	Francisco v. State.....	267
First Nat. Bank v. Lamb.....	607	Franklin Saving Inst. v. Central	
Fischer v. Longbein.....	266, 267	Mutual Fire Ins. Co.....	700
Fisher v. Bassett.....	243	Frederick v. Youngblood..	172, 194
Fisher v. Davis.....	174	Freeman v. Lynch.....	588
Fisher v. Deans.....	264	Freeman v. McLennan.....	597
Fisher v. Leland.....	172	Freeman v. People.....	119
Fisher v. Samuda.....	140, 142, 144	French v. Chase.....	151
Fishmongers' Co. v. East India		Frey v. Kirk.....	361
Co.....	48	Frier v. Jackson d. Van Allen...	356
Fisk v. Tank.....	146	Fritter v. Lord Macclesfield....	130
Fiske v. Foster.....	722	Frost v. Saratoga Mut. Ins. Co..	320
Fitch v. Seymour.....	161	Frost v. Willard.....	592
Fite v. Doe.....	415, 418	Fryatt v. Sullivan.....	589
Fitzgerald, Matter of.....	617	Fulkner v. State.....	60
Fitzroy v. Gwillin.....	399	Fullam v. West Brookfield.....	721
Fitzsimmons v. Ogden.....	286, 287	Fuller v. Jocelyn.....	249
Flamang's Case.....	675	Fuller v. Paige.....	596
Fleming v. Beaver.....	599	Fulton v. Staats.....	263
Fleming v. McDonald.....	206	Furniss v. Ferguson.....	368
Fleming v. Riddick's Ex'rs.....	454		
Flemming v. Marine Ins. Co....	119	Gable v. Gale.....	158
Fletcher v. Fletcher.....	261	Gage v. Smith.....	423
Fletcher v. Fonell.....	265	Gaillard v. Laxton.....	267
Fletcher v. Peck.....	382	Gale v. Davis' Heirs.....	199
Fleytas v. Ponchartrain R. R....	469	Gale v. Seeley.....	586
Flight v. State.....	170	Gallagher v. Waring.....	143
Flinn v. Tobin.....	316	Gallimore v. Ammerman.....	269
Flint River Steamboat Co. v. Fos-		Gallison, <i>In re</i>	598
ter.....	243, 393	Galloway v. Barr.....	134
Flournoy v. City of Jeffersonville	480	Gallup v. Josselyn.....	587
Floyd v. Browne.....	205	Galpin v. Hurd.....	557
Floyd v. Johnson.....	657	Galpin v. Page.....	455

	PAGE		PAGE
Gamble v. Dougherty	415	Goodloe v. Godley	557
Gardiner v. Gray	140, 141, 142	Goodrich v. Fritz	243, 244, 245
Gardner v. McEwen	595	Goodrich v. Treat	522
Gardner v. Newburgh	794	Goodrich v. Williams	598
Garey v. The Bank	176	Goodtitle d. Chester v. Alker. .	415
Garfield v. K. F. & T. M. W. Co.	308	Goodwin v. Blackman	417
Garlick v. Robinson	393	Goodwin v. Richardson	489
Garnett v. Macon	494	Goodwin v. Stephens	267
Garrett v. Hamblin	176	Gordon v. Ross	130
Garrison v. Combs	345, 720	Gordon v. Little	321
Garvin v. Blocker	264	Gordon v. Upham	266
Gates v. Blincoe	351	Gorton v. Frizzell	266, 427
Gates v. Hartman	697	Gosling v. Birnie	197
Gaylord v. Payne	426	Goudy v. Hall	455
Gee v. Patterson	265	Gough v. Bell	767
General Ins. Co. v. United Ins.		Gould v. Banks	754
Co.	668	Gould v. Boston	752
General Mut. Ins. Co. v. Sher-		Governor v. Withers	321
wood.	788, 790	Graff v. Castleman	661
Georgetown College v. Browne..	518	Graffins v. Tottenham	741
Gerke v. Cal. Nav. Co.	308	Grafton Bank v. Moore	512
Germaine v. Burton	144	Graham v. Cammann	356
German Am. Sem. v. Kiefer	130	Graham v. Cooper	401
Gerrish v. Proprietors of Union		Graham v. Lynn	192
Wharf.	769	Graham v. Phoenix Ins. Co.	698
Gibbons v. Hoag	130, 132	Graud v. Chase	411
Gibbs v. Randlett	265, 271	Grand Jury v. Public Press	764
Gibson v. Cooke	498	Granniss v. Brandon	551
Gilbert v. Arnold	682	Grant v. Gould	239
Gilbert v. Hudson	628	Grant v. Raymond	242
Gilchrist v. Cunningham	488	Grattan v. Grattan	423
Gillett v. Stone	440, 444	Graves v. Hampden Ins. Co.	699
Gillett v. Stanley	414	Graves v. Woodbury	455
Gillett v. Thiebold	263	Gray v. Allen	119
Gilliam v. Bird	418	Gray v. Bell	648
Gillilan v. Gray	449	Gray v. Combs	560
Gilman v. Hall	479	Gray v. Cox	142
Gilman v. Thompson	243	Gray v. Givens	416, 418
Gilmore v. Wilbur	167	Gray v. Monongahela Nav. Co..	392
Gilpin v. Howell	601, 723	Grayson v. Williams	433
Girdner v. Taylor	271	Greely v. Hunt	648
Girling's Case	255	Green v. Ashland Iron Co.	589
Gist v. Cole	245	Green v. Biddle.	292, 293, 382
Gist v. Robinet	416	Green v. Covillaud	132
Gittens v. Lowry	357	Green v. Creighton	449
Glascock v. Nelson	133	Green v. Dodge	466
Gleason v. Dodd	617	Green v. Early	667
Glendale Woolen Co. v. Protec-		Green v. Graves	465
tion Ins. Co.	320, 743	Green v. Hart	287
Glenn v. Smith	647	Green v. Keen	682
Glover v. Austin	583	Green v. Rumsey	267
Glover v. Fisher	134	Green v. Stone	454
Goddard v. Gardner	736	Greene v. Linton	479
Godden v. Kimmel	130	Greenfell v. Gridlestone	130
Godfrey v. Alton	752	Greenlee v. Gaines	466
Godfrey v. Cartwright	416, 418	Greenough v. Gaskell	601
Godfrey v. City of Alton	681	Greenup v. Stokes	296
Godfrey v. Humphreys	638	Greeson v. State	186
Godley v. Goodloe	649	Gregg v. Crawford	67
Godsall v. Boldero	692	Gregg v. Wilson	521
Goff v. Great N. Ry. Co.	260	Gregory v. Jackson	418
Gohan v. Maingay	236	Gregory v. Stryker	587
Goid v. Bissell	259, 270	Grendon v. Bishop of Lincoln...	113
Goodlet v. Smithson	387	Griffie v. McClung	205

CASES CITED.

21

	PAGE		PAGE
Griffin v. Bixby.....	586	Hamilton v. Rogers.....	595, 596
Griffin v. Camack.....	368	Hamlet v. Richardson.....	718
Griffin v. Colman.....	268	Hamlin v. Spaulding.....	270
Griffin v. Cunningham.....	125	Hammel v. Queen Ins. Co.....	699
Griffith v. Bogardus.....	593	Hammett v. Emerson.....	172
Griffith v. Wright.....	357	Hammond v. Allen.....	249
Grignon's Lessee v. Astor.....		Hampton v. McConnel.....	452, 459
.....234, 235,	239	Hanchworth v. Murphy.....	133
Gross v. Rice.....	267	Hancock v. Carlton.....	748
Grosvenor v. Atlantic Fire Ins.		Hancock v. Harper.....	130
Co.....	700	Hanlon v. City of Keokuk.....	469
Grosvenor v. Austin.....	203	Hanna v. Ratakin.....	134
Grow v. Albec.....	88, 401	Hanna's Syndics v. Loring.....	150
Grumon v. Raymond.....	263, 266	Hannibal etc. R. R. Co. v. Craw-	
Guest v. Homfray.....	494	ford.....	589
Guille v. Swan.....	205	Hanover v. Turner.....	492
Guilleanme v. Rowe.....	265, 266	Hanson v. Gardiner.....	675, 676
Guiteau v. Wisely.....	455	Hanson v. Millett.....	585
Gully v. Grubbs.....	502	Harding v. Coburn.....	588, 596
Gundy v. Bileler.....	585	Harding v. Handy.....	289
Guy v. Rand.....	415	Hardy v. Adams.....	449
Gwatkin v. Commonwealth.....	378	Hardy v. Summers.....	661, 671
Gwin v. McCarroll.....	239, 441	Hargrave v. Lewis.....	401
Gyger's Estate.....	518	Harkins v. State.....	259
		Harkness v. Burton.....	508
Habergham v. Vincent.....	488	Harlow v. Lake Superior Iron Co.	130
Hackett v. King.....	265	Harman v. Brotherson.....	426
Hadden v. Shoutz.....	411	Harman v. Kelley.....	431
Haddock v. Waterman.....	444, 445	Harman v. Commonwealth.....	376
Hadduck v. Murray.....	557	Harman v. Sanderson.....	146
Haden v. Walker.....	368	Harmon v. Clark.....	338
Hadley v. New Hampshire Fire		Harp v. Chandler.....	402
Ina. Co.....	698	Harrington v. Wheeler.....	494
Haffner v. Dickson.....	134	Harris v. Bannon.....	589
Hagan v. Cambell.....	584	Harris v. Carson.....	321
Hagerty v. Mann.....	130	Harris v. Gillingham.....	166, 167
Haight v. Hoyt.....	367	Harrisburg v. Crangle.....	417
Hailman v. Buckmaster.....	453	Harrison v. Crowder.....	649
Haines v. Kent.....	460	Harrison v. Milwaukee.....	718
Hale v. N. J. S. N. Co.....	715	Harrison v. Stevens.....	414, 416
Hale v. Washington Ins. Co.....		Hart v. Dorman.....	490
.. 775, 784, 785, 786, 788, 789,	790	Hart v. Gregg.....	741
Hale v. Woods.....	298, 720	Hart v. Seixas.....	239
Haley v. Manufacturers' Ins. Co.	696	Hart v. Ten Eyck.....	287, 592
Hall, <i>Ex parte</i>	615	Hart v. Wright.....	140, 143
Hall v. Cushman.....	598	Hartfield v. Roper.....	74, 469
Hall v. Hrabowski.....	183	Hartford Fire Ins. Co. v. Olcott	
Hall v. O'Malley.....	267, 270	.....	699, 700
Hall v. Page.....	179	Hartwell v. Kelly.....	588
Hall v. Railroad Cos.....	697	Harvey v. Alexander.....	502
Hall v. Tuttle.....	148	Harvill v. Lowe.....	393
Hall v. Williams.....	760, 617	Harwood v. Lovell.....	731
Halleck v. Doming.....	265	Harwood v. Siphers.....	266
Halley v. Oldham.....	462	Hass v. Flint.....	402
Halliday v. Noble.....	265	Hassett v. Ridgley.....	431
Halloway v. Freeman.....	449	Hasting v. Westchester Fire Ins.	
Halsey v. Martin.....	417	Co.....	700
Ham v. Ham.....	635	Hastings v. Lovering.....	144
Ham v. Kendall.....	588	Hatch v. Cobb.....	494
Hamersley v. Lambert.....	326	Hathaway v. Clark.....	617, 619
Hamilton v. Adams.....	455	Hatton v. Robinson.....	601, 735
Hamilton v. Cunningham.....	592	Haughy v. Strang.....	466
Hamilton v. Dewey.....	449	Hauss v. Kohlar.....	265
Hamilton v. Ely.....	674, 680	Hawk v. Ridgway.....	259

	PAGE		PAGE
Hawkins v. Governor.....	404, 604	Hills v. Milla.....	521
Hawkins v. Hatton.....	205	Himes v. Barnitz.....	454
Hawkins v. Taber.....	431	Hinde v. Longworth.....	356
Hawkins v. Welch.....	402	Hinman v. Booth.....	411, 414
Hay v. Mayer.....	299	Hinson v. Hinson.....	50
Hayden v. Attlebury.....	752	Hinton v. McNeil.....	546
Hayden v. Stone.....	752	Hipp v. State.....	582
Haydon v. Haydon.....	421	Hobert v. Stroud's Case.....	251
Haynie v. Hall's Ex'r.....	45	Hodge v. Owings.....	401
Hays v. Richardson.....	161	Hodges v. Johnson.....	134
Haywood v. Leonard.....	479	Hodgman v. Western R. R. Co..	367
Haywood v. Collins.....	409, 449	Hoen v. Simmons.....	496
Hazard v. Irwin.....	140	Hoffman v. Armstrong.....	597
Hazard v. N. E. M. Ins. Co.....	782	Hoffman v. Beard.....	431
Hazelbaker v. Goodfellow.....	585	Hoffman v. Carow.....	303
Hazelton v. Putnam.....	508	Hoffman v. Strohecker.....	83
Head v. Egerton.....	288	Hogan v. State.....	151
Heane v. Rogers.....	629	Hogg v. Ward.....	268
Heaney v. Heeney.....	165	Holbrook v. Hyde.....	593
Heard v. Harris.....	264	Holden v. Dakin.....	140
Heath v. Hubbard.....	177	Holder v. Coates.....	585
Helbut v. Held.....	617	Holder v. State.....	111
Heller, Matter of.....	616	Holdfast v. Marten.....	638
Helm v. Wilson.....	479, 480	Holdfast v. Shepard.....	416, 418
Hemphill v. Sappington.....	243	Hollingsworth v. Barbour.....	239
Hempstead v. Watkins.....	466	Hollingsworth v. Napier.....	302
Henderson v. Hackney.....	393, 404	Hollinsead v. Mactier.....	475
Henderson v. Hicks.....	132	Holby v. Carson.....	269
Henderson v. Mitchell.....	466	Holly v. Brown.....	595
Henderson v. Vaulx.....	53	Holmes v. Carondelet.....	546
Henderson v. Western etc. Ins. Co.....	787	Holmes v. Charlestown Mut. Fire Ins. Co.....	320
Henderson v. Western M. & F. Ins. Co.....	779	Holmes v. Gerry.....	401
Henn's Case.....	732, 733	Holmes v. Remsen.....	713, 714
Herndon v. Kimball.....	296, 608	Holmes v. Seeley.....	414, 415, 416, 417, 728, 732, 733
Herrick v. Dean.....	401	Holt v. Alloway.....	460
Herring v. State.....	259	Holt v. Rogers.....	133
Hershey v. Clarksville Ins. Co..	245	Holyoke Co. v. Lyman.....	769
Herzog v. Graham.....	266	Homer v. Marshall.....	619
Heskett v. Lee.....	619	Honore v. Lamar Fire Ins. Co...	697
Hess v. Balt. etc. R. R.....	681	Hopkins v. Calloway.....	546
Hesseltine v. Stockwell.....	591, 592, 624, 628	Hopkins v. West.....	402
Hester v. Coats.....	357	Hopkins Mfg. Co. v. Aurora etc. Ins. Co.....	698
Heward v. Slagle.....	521	Hooker v. Smith.....	80
Hewett v. Outland.....	368	Hord v. Baugh.....	457
Hewlins v. Shippam.....	161, 165	Horn v. Wildlake.....	733
Heyward v. Cuthbert.....	208	Horner v. State Bank of Indiana.	242
Hibbard v. Russell.....	741	Horner v. Zimmerman.....	455
Hicks v. Cleveland.....	367	Horok v. Kimball.....	369
Hicks v. Hotchkiss.....	710	Horry v. Glover.....	585
Hicks v. Whitmore.....	300	Hoskins v. State.....	378
Hiestand v. Kuns.....	58	Hough v. Coughlan.....	131
Higgenbotham v. Green.....	261	Houghton v. Manufacturers' etc. Ins. Co.....	313, 320, 743, 744
Higgins v. Kusterer.....	586	Houghton v. Stowell.....	401
Higgins v. Lee.....	480	Howard v. Grover.....	551
Higginson v. Dall.....	316	Howard v. Hoey.....	140, 143, 145, 146
Higginson v. Faber.....	519	Howard v. Rogers.....	673
Hildreth v. Sands.....	291	Howe v. Lawrence.....	338
Hill v. Chapman.....	207	Howes v. Grush.....	795
Hilliard v. Connelly.....	403, 404	Hoy v. Morris.....	736
Hillier v. Alleghany etc. Ins. Co.	787	Hoy v. Sterrett.....	794
Hilliker v. Loop.....	158		

CASES CITED.

23

	PAGE		PAGE
Hubbard v. Elmer.....	307	Jackson v. Ellis	353
Hubbard v. Harris.....	444	Jackson v. French	736
Hubbell v. Broadwell's Adm'rs..	454	Jackson v. Hart	404
Hubbell v. Schoening	133	Jackson v. Hathaway..638, 681,	793
Hudson v. Warner.595, 660, 664,	666	Jackson v. Haviland	545, 546
Huff v. Earl.....	593	Jackson v. Joy	356
Huggins v. Ketchum.....	415	Jackson v. King	619
Hughes v. Blake.....287,	289	Jackson v. Lawton.....	391
Hughes v. Edwards.....	130	Jackson v. Ligon	494
Hughes v. Garth.....	288	Jackson v. Loomis	292
Hughes v. Holliday	416, 418	Jackson v. Mass. Mut. F. Ins. Co.	693
Hughes v. Hughes.....	207	Jackson v. McCall	356
Hughes v. Martin.....	447	Jackson v. Murray	356, 635
Hughes v. Trahern.....368,	455	Jackson v. Pierce.....	356
Hughes v. Trustees of Weston		Jackson v. Robins	277
College.....	676	Jackson v. Stanley.....	404
Hume v. Long.....	130	Jackson v. Striker	356
Hunt v. Amidon..	589	Jackson v. Waldron.....	635
Hunt v. Bates.....	205	Jackson v. Wood	356
Hunt v. Ennis.....	249	Jackson v. Woodruff.....	353
Hunt v. Test.....	480	Jackson v. Woolsey.....	356
Hunter v. Leavitt.....	480	Jackson v. Wright.....	635
Hunter v. Miller.....	720	Jackson d. Pearson v. Housel...	638
Hunter v. Sherman	444	James v. Johnson.....	488
Huntley v. Bulwer.....	551	James v. McKernon.....287,	289
Hurd v. West.....	587	Janson, <i>Ex parte</i>	202
Hurlburt v. Brittain	465	Janson v. Ball.....	368
Hurlburt v. Hicks	409	January v. January.....	393
Hurlburt v. Mayo.....	83	Jauncey v. Thorne.....	423
Hurst v. McNeil.....	288	Jefferson Ins. Co. v. Cotheal....	582
Hutchins v. Hope.....	680	Jeffersonville R. R. v. Hendricks'	
Hutchins v. Shaw.....	588	Adm'r	470
Hutchinson v. Sangster.....	268	Jeffries v. Evans.....454,	455
Hutchinson v. Sinclair.....	502	Jeffry v. Walton.....	193
Hutchison v. McNutt	131	Jenckes v. Gaffe	588
Hyatt v. Boyle.....	145	Jenkins v. McCurdy	589
Hyde v. Cookson.....	586	Jenkins v. Pepoon	453
Hyde v. Taylor.....	82	Jenkins v. Steanka.....	592
Hylton v. Brown.....294,	354	Jenkins v. Waldron.....	564
		Jennings v. Camp.....	480
Ibbotson v. Galway.....	618	Jennings v. Chenango County M.	
Idaho, The.....	592	Ins. Co	315
Imhoff v. Witmer's Adm'r.....	519	Jenny Lind Co. v. Bower.....	304
Independent Ins. Co., <i>In re</i>	716	Jerald v. Elly	503
Indianapolis etc. R. R. v. Keeley's		Jerome v. Ross.....	675
Adm'r	470	Jerrard v. Saunders.....	287
Indianapolis etc. R. v. Risley...	460	Jewett v. Dringer.....	592
Ingalls v. Eaton.....	503	Jewett v. Locke	265
Inglebright v. Hammond.....		Jewett v. Palmer	288
.....172, 321, 587,	590	Johns v. Scott.....	668
Ingram v. Belk.....	296	Johnson v. Anderson.....	637
Ingram v. Butts	267	Johnson v. Beardslee.....	360
Inhabitants v. Benson.....	357	Johnson v. Diversey.....130,	132
Inhabitants etc. v. Eaton	401	Johnson v. Hunt.....	589
Ins. Co. v. Union Canal Co.....	133	Johnson v. Jordan	163
Irish v. Smith.....	512	Johnson v. Maxwell.....	267
Irwin v. Scribner.....	205	Johnson v. Nevill.....	418
Irwin v. Sprigg.....	469	Johnson v. Norton.....	418
Isaacs v. Camplin	270	Johnson v. Somerville	132, 133
		Johnson v. Tompkins	259
Jack v. Hudnall	205	Johnson v. Toulmin....131, 286,	681
Jackson v. Bull.....	635	Johnson v. Von Kettler.266, 269,	270
Jackson v. Cady.....	404	Johnson v. Whitefield.....	469
Jackson v. Davis	357	Joliffe v. Hite.....	210

	PAGE		PAGE
Jones v. Barkley.....	399	King v. Baldwin.....	651
Jones v. Bright.....	141	King v. Hamilton.....	133
Jones v. Chiles.....	544	King, The, v. Darley.....	376
Jones v. Commercial B'k. 243, 455,	467	King, The, v. Inhab. of Horndon	
Jones v. Cook.....	276, 277	on the Hill.....	165
Jones v. Crittenden.....	393	King, The, v. Montague.....	766
Jones v. Fletcher.....	643	Kingsbury v. Taylor.....	145
Jones v. Hardesty.....	333, 467	Kingsley, <i>In re</i>	716
Jones v. Jones.....	466, 521	Kinney v. Harvey.....	657
Jones v. Joyner.....	401	Kinsler v. McCants.....	333
Jones v. Littlefield.....	44	Kirbie v. State.....	267
Jones v. Lowell.....	205	Kirby v. Schoonmaker.. 158, 203,	333
Jones v. Manchester.....	286	Kirkpatrick v. McCullough. 217,	648
Jones v. Moore.....	595	Kirkpatrick v. Thrupp.....	287
Jones v. Robbins.....	596	Kirkpatrick v. Wherritt.....	401
Jones v. Seward.....	263	Kirksey v. Prior.....	175
Jones v. Smith.....	662, 663, 664	Kisten v. Hildebrand.....	119
Jones v. Tevis.....	512	Kneeland v. Ensley.....	200
Jones v. Thomas.....	288	Knight v. Sampson.....	736
Jones v. Walker.....	416	Knot v. Gay.....	268
Jones v. Winchester.....	632	Knott, <i>Ex parte</i>	286
Jonesboro etc. Turnpike Co. v.		Knott v. Cunningham.....	205
Baldwin.....	470	Knott v. Morgan.....	727
Jordan v. Thornton.....	715	Knox v. Work.....	205
Josselyn v. McAllister.....	267	Kock v. Branch.....	305
Josslyn v. Commonwealth.....	376	Koles v. Kelsey.....	250
Joy v. Hull.....	167	Koon v. Greenman.....	476
Joy v. Jackson & M. P. R. R. ..	63	Kreutzer v. Cooney.....	596
Julian v. Hoosier Drilling Co. ..	727	Krug v. Ward.....	267, 271
Justice v. Gosling.....	268		
Kase v. John.....	144, 146	Ladd v. Griswold.....	332, 333
Kearney v. Smith.....	466	Ladd v. Southern Cotton Press	
Kechele's Case.....	522	Co.....	719
Kellogg v. Blair.....	638	Ladue v. Seymour.....	476
Kelley v. Hurt.....	130	Laffell v. Wash.....	244
Kellogg v. Churchill.....	245	Laing v. Fidgeon.....	140, 142
Kellogg v. Lovely.....	585	Lakeman v. Burnham.....	769
Kelly v. Hare.....	415, 418	Lamb v. Day.....	76
Kelogg v. Wilson.....	180, 131	Lambert v. Paine.....	288
Kelsey v. Universal Life Ins. Co.	320	L'Amoureux v. Crosby.....	616
Kemp v. Kennedy.....	242	Lampton v. Preston.....	586
Kendall v. Russell.....	321	Landon v. Humphrey ..	550, 551
Kendall v. Stokes.....	756	Landon v. Litcutfield.....	382
Kendrick v. Delafield.....	302	Lane v. Dorman.....	393, 404
Kennard v. Burton.....	469, 573	Landt v. Hilts ..	265, 266, 267
Kennedy v. Favor.....	268	Langdon v. Paul.....	79
Kenner v. Caldwell.....	466	Lansing v. Smith.....	769
Kennon v. McRea ..	216	Lansing v. Stowell.....	590
Kensington, Taylor, <i>Ex parte</i> ...	202	Lapish v. Bangor Bank.....	767
Keon v. White.....	134	La Roe v. Roeser.....	263
Kernochan v. New York etc. Ins.		Larrabee v. Talbot.....	715
Co.....	697, 698	Lasala v. Holbrook.....	351
Kernot v. Norman.....	618	Latham v. The Wash. B. & L. A.	401
Kerr v. Forgue.....	75	Lathrop v. Commercial Bank of	
Kessel v. Albetis..	367, 368	Scioto.....	535
Ketchum v. Evertson.....	480	Laverty v. Hall's Adm'r.....	496
Key v. Collins.....	440, 444	Lawless v. Blakely.....	402
Kilbourn v. Thompson.....	268	Lawrence v. Derby.....	270
Kimball v. Blaisdell.....	635	Lawrence v. Hedger.....	268
Kimball v. Cunningham.....	140	Lawrence v. Jarvis.....	455
Kimball v. Moloney.....	265	Lawrence v. Lawrence.....	133
Kimball v. Thompson.....	337	Lawrence v. Pond.....	83
Kimberly v. Patchin.....	590	Lawrence v. Trustees.....	329
		Layman v. Hendrix.....	204

CASES CITED.

25

	PAGE		PAGE
Leach v. Beardalee.....	321	Lomax v. Bailey.....	475
Leach v. Francis.....	268	Lonergan v. Stewart.....	587, 590
Leach v. Marsh.....	619	Long v. Colburn.....	720
Leach v. Thomas.....	369	Long v. Morrison.....	621
Leachman v. Dougherty.....	427	Long v. State.....	378
Leavitt v. Blatchford.....	465	Look v. Dean.....	268
Leavitt v. Putnam.....	648	Loomis v. Eagle Life Ins. Co....	696
Leavitt v. Smith.....	176	Loomis v. Green.....	593
Le Chevalier v. Lynch.....	713	Loomis v. Terry.....	560
Le Clercq v. Gallipolis.....	752	Lord v. Chadbourne.....	643
Lee v. Cone.....	55	Lord v. State.....	119, 186, 378
Leeds v. Mar. Ins. Co... ..	287, 289	Lord Bokeby v. Elliott.....	592
Le Fevre v. Le Fevre.....	165, 167	Loring v. Manufacturers' Ins. Co.	700
Leggett v. N. J. M. & B. Co....	345	Loring v. Marsh.....	455
Le Guen v. Gouverneur.....	466	Losee v. Dunkin.....	216
Leiman's Estate.....	668	Lothrop v. Arnold.....	638
Lendall & Pinfold's Case.....	205	Lott v. Dysart.....	393
Le Neve v. Le Neve.....	660	Louden v. Waddle.....	694, 696
Lenoir v. South.....	415, 416	Louisville etc. R'y v. Boland....	470
Lenox v. Prout.....	287, 289	Louisville R. R. Co. v. Letson ..	535
Leonard v. Leonard.....	734	Louvale v. Menard.....	431
Leonard v. Adams.....	795	Love v. Fairfield.....	451
Leonard v. Stacy.....	255	Love v. Humphrey.....	267
Lequotte v. Drury.....	130	Lovejoy v. Murray.....	201, 205
Lessee of Snyder v. Snyder....	441	Lovelock v. King.....	478
Letzler v. Huntington.....	265	Low v. Martin.....	590
Leverett v. Dismukes.....	518	Low v. Tibbetts.....	793
Levi v. Milne.....	112	Lowber & Wilmer's Appeal.....	158
Levy v. Cadet.....	360	Lowe v. McDonald.....	500
Levy v. Edwards.....	268	Lowe v. Miller.....	167, 179
Levy v. Shurman.....	433	Lowe v. Paramoru.....	99
Lewis v. Brackenridge.....	393	Lowell v. Spaulding.....	63
Lewis v. McFarland.....	416	Lowry v. Hall.....	455
Lewis v. Penfield.....	266	Loyd v. State.....	378
Lewis v. Stein.....	795	Lucas v. Heaton.....	478
Lewis v. United States.....	332	Lucas v. McBlair.....	677
Lewis v. Woods.....	496	Lucas v. Seale.....	652
Lightner v. Steinagel.....	409	Lucas v. Taunton & N. B. R. R.	
Ligonier v. Ackerman.....	718	Co.....	75
Lile v. Hopkins.....	505	Lucketts v. Townsend.....	449
Lining v. Geddes.....	351	Ludden v. Leavitt.....	554
Linnendall v. Doe.....	585	Luddington v. Peck.....	283
Linton v. Anglin.....	445	Ludlow v. Van Camp.....	250
Lipsky v. Bergman.....	588	Lupton v. White.....	592, 626
Litchfield v. Falconer.....	193	Lykens Valley Coal Co. v. Dock.	589
Livermore v. Peru.....	718, 719	Lynch v. Dalzell.....	685
Liverpool etc. v. Grand etc....	130	Lynch v. Metropolitan Elevated	
Livingston v. Bishop... ..	204, 205, 206	R'y Co.....	260
Livingston v. Burroughs.....	270	Lynch v. Nurdin.....	73, 74
Livingston v. Mayor etc. of N. Y.	681	Lyon v. Kain.....	419
Livingston v. Salisbury.....	130, 131		
Livingston v. Ten Broeck.....	321	Mack v. Parsons.....	492
Lloyd v. Collett.....	494	Mackinley v. McGregor... ..	492
Lloyd v. Currin.....	43	Macklot v. Dubreuil.....	357
Loard v. Phillips.....	418	Macomber v. Parker.....	316
Lobdell v. Stowell.....	591	Maddox v. McGuaen.....	133
Locke v. Motley.....	769	Maddox v. Sullivan.....	400
Locke v. Williamson.....	145	Maghee v. Kellogg.....	454
Lockhart v. Gier.....	166	Maghill v. Hinsdale.....	720
Lockwood v. Bull.....	554	Magruder v. Peter.....	417
Loftin v. Espy.....	53	Maher v. Farwell.....	130
Logan v. Moulder.....	500, 503	Mahon v. Harrison.....	521
Logansport etc. R. R. Co. v. Wray.	754	Mahoney v. Mahoney.....	431
Lohman v. People.....	614	Mahoney v. Middleton.....	416

	PAGE		PAGE
Mahoney v. Van Winkle	546	Mayor etc. of Mobile v. Guille ...	642
Makie v. Smith	589	Mayor etc. of N. Y. v. Bailey ...	482
Mallory v. Willis	587	McAllister v. Reab	143, 144
Mandeville v. Mandeville	520	McAlpin v. Lec	146
Maner v. State	259, 269	McArthur v. Porter	417
Mann v. Buford	409	McCall v. Corning	270
Manners v. Manners	431	McCall v. McDowell	263
Manning v. Smith	411	McCalmont v. Whitaker	795
Manny v. Stockton	401	McCargo v. New Orleans Ins. Co.	787
Mansfield's Case	598, 616	McCarthy v. De Armit	268
Man. & Mech. B'k v. B'k of Pa.	462	McCann v. Sloan	657
Manufacturers' etc B'k v. Gore ..	303	McClure v. Miller	466
Mar, Ex parte	243	McClure v. Secrist	479
Marble v. City of Worcester	787	McConihe v. N. Y. etc. R. R. Co.	587
Marbury v. Madison	238, 604	McCorkle v. Doby	146, 512
Marks v. Pell	488	McCormick v. Connolly	478
Marlatt v. Levee S. C. P. Co	345	McCormick v. Mayor of Balt	681
Marquis of Stafford v. Coyney ...	751	McCormick v. McClure	455
Marr v. Peay	657	McCormick v. Sullivant	232
Marriott v. Stanley	70, 71	McCotter v. McCotter	369
Marsh v. Berry	205	McCoy v. Poor	130
Marsh v. Putnam	716, 723	McCrea v. Purmont	502, 503
Marsh v. Williams	268	McCreeliss' Distributees v. Hin-	
Marshall v. Balt. & C. R. R. Co.	538	kle	183
Marshall v. Heller	260	McCulloch v. Maryland	238
Marshall v. Means	131	McCulloh v. Dashiell	203
Marshall v. Perry	132, 133	McCullom v. Buchanan	41
Marshall v. Shafter	546	McCutchen v. McGahay	492
Marshalsea, Case of	232, 233	McDonald v. Black's Adm'r	698
Marston v. Hobbs	503	McDonald v. Smith	402
Martin v. Bigelow	794	McDowell v. Goodwyn	360
Martin v. Boyd	217	McDowell v. Russell	593
Martin v. Dukes	520	McElmoyle v. Cohen	459
Martin v. Long	500	McFadden v. Haley	416
Martin v. Wadell	766	McGhee v. Hill	479
Martin v. Winslow	647	McGehee v. Shafer	205
Marvin v. Hawley	409	McGregor v. McGregor	518, 520
Mary, The	220	McIntyre v. Carver	628
Mason v. Holt	794	McIntire v. Radluns	268
Mason v. Sewall	265	McJilton v. Love	368
Massingell v. Downs	279	McKee v. Judd	367
Masters v. Eastis	389	McKean v. Wagenblast	593
Masters v. Pollie	585	McKellip v. McIlhenny	166, 167
Masters v. Varner's Ex'rs	741	McKemri v. Compton	393
Masterton v. Mayor of Brooklyn	480	McKnight v. Taylor	130
Mateer v. Brown	307	McLagan v. Brown	454
Matheny v. Galloway	406	McLain v. Carson's Ex'r	203, 332
Mather v. Bush	710	McLassen v. Beadle	216
Mathes v. Dobschuetz	589	McLaughlin v. Shepherd	667
Mathews v. Howard Ins. Co		McLaughlin v. Shields	134
	786, 789, 790	McLennon v. Richardson	268
Mathews v. Menedger	205	McMillan v. Cronin	733
Mathis v. Clark	150	McMillan v. Vanderlip	480
Maundrell v. Maundrell	286	McMaster v. Haynes	627
Maxwell v. Alison	741	McPherson v. Cunliff	225, 238, 242
Maxwell v. Harrison	188	McQueen v. Heck	259
May v. Buckeye Mut. Ins. Co ..	321	McVicker v. Beedy	633
May v. State Bank of N. C	448	Mead v. Hughes' Adm'r	621
Mayhew v. Norton	167	Mead v. Mercantile Mut. Ins. Co.	697
Mayor of Balt. v. Lefferman	718	Mead v. Steger	502
Mayoretc. of Frederick v. Groshon	682	Meadowcroft v. Agnew	409
Mayor of Kingston v. Horner ...	356	Meadows v. Duchess of Kingston	239
Mayor of Macon v. County Acad-		Meadows v. Meadows	306
emy	365	Mears v. Com'rs of Wilmington	483

CASES CITED.

27

	PAGE		PAGE
Megotti v. Colville.....	267	Moody v. Palmer.....	794
Menagh v. Whitwell.....	339	Moody v. Wright.....	588, 596
Meraman's Heirs v. Caldwell's Heirs.....	418	Moore v. Armstrong.....	395
Merchants' Bank v. Birch.....	562	Moore v. Bowman.....	593
Merchants' B'k v. Central B'k..	720	Moore v. Durgin.....	268
Merchants' B'k v. Lutterloh....	401	Moore v. Erie R'y Co.....	595
Merchants' Nat. B'k v. McLaugh- lin.....	596	Moore v. Madden.....	489
Merlin v. Proprietors of Locks..	45	Moore v. Magan.....	85
Merrick's Estate.....	497	Moore v. Watts.....	266
Merrill v. Ithaca & Owego R. R..	479, 480	Moran v. Jessup.....	546
Merriman v. Bryant.....	262	More v. Bagley.....	466
Merritt v. Brinkerhoff.....	794	More v. Smedburgh.....	494
Merritt v. Brown.....	133	Morford v. Mastin.....	479
Merritt v. Johnson.....	583, 587	Morford v. Woodworth.....	470
Metts v. Bright.....	300	Morgan v. Gregg.....	591
Miami Exp. Co. v. Bank of U. S.	488	Morgan v. Hays.....	125
Middleton v. Perry.....	416	Morgan v. Schermerhorn.....	88
Middleton v. Pritchard.....	411, 584, 794	Morison v. Salmon.....	727
Mickels v. State.....	60	Morley v. Green.....	357
Miles v. Stephens.....	601	Morningstar v. Selby.....	457
Mill v. Martin.....	441, 447	Morris v. Hall.....	305
Millar v. Field.....	367	Morris v. Rowan.....	500
Millard's Case.....	287	Morrison v. Helm.....	402
Miller v. Auburn etc. R. R. Co..	161, 163, 164, 165	Morse v. Green.....	720
Miller v. Barkaloo.....	243	Morse v. Shattuck.....	502, 503
Miller v. Bear.....	134	Morse v. Stocker.....	752
Miller v. Dingham.....	45	Moseley v. Smith.....	402
Miller v. Bledsoe.....	498	Moses v. Dubois.....	259
Miller v. Butler.....	741	Moses v. Mead.....	140, 141, 145
Miller v. Grice.....	264, 270	Mostyn v. Fabrigas.....	229
Miller v. Henlon.....	133	Motley v. Manufacturers' Ins. Co.	643, 699
Miller v. Knox.....	763	Motley v. Sargent.....	794
Miller v. McCloskey.....	75	Mott v. Hicks.....	345
Miller v. Miller.....	795	Mower v. Kip.....	480
Miller v. Seare.....	234	Mower v. Mower.....	415
Miller v. Smith.....	144	Mowry v. White.....	596
Miller v. White.....	657	Mulford v. Stalzenback.....	455
Millison v. Fisk.....	409	Mumford v. Whitney.....	160, 161, 163, 164, 166, 167
Mills v. Duryea.....	452, 459	Munger v. Grinnell.....	417
Mills v. Hall.....	351	Munger v. Tonawanda R. R.....	469
Mills v. Matthews.....	667	Municipality No. 2 v. Cotton Press	584
Milnes v. Duncan.....	718	Munroe v. Merrill.....	267
Mims v. Cent. B'k of Georgia....	215	Murdock v. Boston & A. R. R. Co.....	260, 271
Minehan v. Thomas.....	268	Murfree v. Carmack.....	300
Miners' Bank v. United States...	392	Murphy v. Adams.....	628
Minge v. Smith.....	210	Murphy v. Blair.....	466
Minkhart v. Hankler.....	418	Murphy v. Deane.....	74
Mitchell v. Dorrs.....	675, 676	Murphy v. Diamond.....	558
Mitchell v. Robertson.....	546	Murphy v. Orr.....	417
Mitchell v. Robinson.....	469	Murphy v. S. C. & P. R. Co....	586
Mitchell v. State.....	253	Murphy v. Trigg.....	488
Mix v. Hotchkiss.....	698	Murphy v. Walters.....	265
Mixer v. Coburn.....	146	Murray v. Gouverneur.....	294
Moale v. Mayor etc. of Balt.....	681	Myers v. Brownell.....	304
Mohawk B'k v. Broderick.....	557	Myers v. Malcolm.....	308
Montee v. Commonwealth.....	112	Myers v. Myers.....	208
Montgomery v. State.....	112	Myers v. Perry.....	558
Montgomery v. Sutton.....	268	Myers v. Sanders.....	354
Montrion v. Jeffreys.....	551	Myrick v. Hasey.....	419, 423
Moody v. Keener.....	191	Napier v. Gidiere.....	598

	PAGE		PAGE
Natchez v. Minor.....	715	Oldhams v. Jones.....	430
Natchez Ins. Co. v. Stanton.....	787	Oliver v. Oliver.....	172
National Bank v. Lewis.....	401	Oliver v. Pray.....	466
Nealy's Appeal.....	131	Oliver v. Worcester.....	752
Nebenzahl v. Townsend.....	269	Olmstead v. Olmstead.....	332
Needler v. Bishop of Winchester.	98	Omelvany v. Jagers.....	794
Neilson v. Neilson.....	416	Omerod v. Hardman.....	494
Nelson v. Carrington.....	657	O'Neale v. Lodge.....	502
Nelson v. Cooley.....	88	Oneida v. Manf. Soc. v. Lawrence	
Nelson v. Suffolk Ins. Co.....	790	.....	140, 141
Nesmith v. Sheldon.....	465	Orear v. McDonald.....	648
Nettleton v. Sikes.....	165	Orser v. Storms.....	585
New Barbadoes v. Vreeland.....	134	Orth v. Jennings.....	461
Newby v. Perkins.....	50, 409, 547	Osborn v. Breman.....	134
Newcomb v. Peck.....	460	Osborne v. Bell.....	90
Newell, Ex parte.....	368	Osborne v. Humphrey.....	382
New England etc. Ins. Co. v. Wet-		Osgood v. Lewis.....	145
more.....	696	Osterhout v. Roberts.....	204
Newhall v. Ireson.....	994	Overseers of Alexandria v. Over-	
Newkirk v. Sabler.....	728, 732, 733	seers of Bethlehem.....	58
Newlin v. Duncan.....	361	Overseers of Pittstown v. Over-	
Newman v. McGregor.....	480	seers of Plattsburgh.....	763
New Orleans etc. R. R. Co. v.		Overton v. Gorham.....	283
Kerr.....	561	Overton v. Woolfolk.....	430, 431
Newsom v. Newsom.....	44	Oviatt v. Brown.....	462
Newton v. Locklin.....	268, 271	Owen v. Daviss.....	619
Nichols v. Baxter.....	698	Owen v. Field.....	748
Nichols v. Bellows.....	402	Owsley v. Montgomery etc. R. R.	
Nichols v. Reynolds.....	489	Co.....	260
Nichols v. Skeel.....	401		
Nichols v. Valentine.....	643	Pacheco's Estate.....	521
Nickelson v. Ingram.....	518	Pacific etc. v. Missouri etc....	130, 132
Nicodemus v. Nicodemus.....	682	Pack v. Thomas.....	321
Niell v. Morley.....	619	Padfield v. Green.....	455
Noble v. Merrill.....	369	Page v. Freeman.....	205
Noe v. Purchapile.....	50	Page v. Smith.....	601
Nolan v. Sweeny.....	417	Paige v. Stone.....	299
Norment v. Smith.....	44	Paine v. Woods.....	793
Norris v. Hume.....	466	Paine v. York.....	418
Norris v. School District.....	479	Painter v. Ives.....	265
Northrop v. Graves.....	719	Palen v. Johnson.....	401
North-western Distilling Co. v.		Palmer v. Lord.....	399, 401
Brant.....	720	Palmer v. Merrill.....	498
Norton v. Valentine.....	794	Palmer v. Oakley.....	448, 518
Norvell v. Camm.....	404	Pardee v. Robertson.....	175
Norwich F. Ins. Co. v. Boomer..		Parham v. Randolph.....	347
.....	697, 698	Parham v. Raynal.....	360
Nowlen v. Colt.....	590	Parker v. Carter.....	601, 734
Nusz v. Grove.....	521	Parker v. Cutler Milldam Co.....	768, 769
Nutt v. Verney.....	618	Parker v. Gerard.....	430
Nye v. Kellam.....	79	Parker v. Godin.....	178
Nye v. Liscombe.....	632	Parker v. Griswold.....	795
		Parker v. Palmer.....	140
Oades v. Woodward.....	249	Parker v. Smith.....	672, 673
Oakley v. Hurlburt.....	130	Parker v. South Carolina.....	698
Obert v. Hammel.....	418	Parkes v. Morse.....	255
O'Brien v. Elliott.....	400	Parkhurst v. Van Cortland.....	166, 167
Officer v. Young.....	393	Parkinson v. Lee.....	140
Ogden v. Montreal Ins. Co.....	695	Parks v. General Interest Ins. Co.	316
Ogden v. Saunders.....	710, 711, 715, 716	Parks v. Mosher.....	630
Ogden v. Stewart.....	595	Parmalce v. Lawrence.....	402
Oglesby v. State.....	262	Parneter v. Gibbs.....	766
Okell v. Smith.....	143	Parsons v. Camp.....	165
O'Keson v. Silverthorn.....	417	Parsons v. Parsons.....	404

CASES CITED.

29

	PAGE		PAGE
Partridge v. Menck.....	727	Perry v. Pettingill.....	538
Paschal v. Davis.....	394	Perry v. Walker.....	416
Patapsco Ins. Co. v. Coulter....	779	Peters v. Warren Ins. Co.....	
Patterson v. Prior.....	265, 267	...775, 784, 785, 786, 788, 789,	790
Patterson v. State.....	111, 119	Peterson v. Clark.....	488
Patterson v. Westerveldt.....	174	Peterson v. Orr.....	393
Patterson v. Winn.....	391	Pettingill v. Rideout.....	303
Patton v. Cooper.....	416	Petty v. Malier.....	418
Paul v. Carver.....	794	Phelan v. Bonham.....	244
Paul v. Hussey.....	619	Phelps v. Blount.....	198
Pavey v. Burch.....	321	Phelps v. Sheldon.....	479
Paw v. Beckner.....	268	Philanthropic Build. Ass. v. Mo-	
Payne v. Matthews.....	203	Knight.....	401
Paynes v. Coles.....	287	Philips v. Chichester.....	99
Paysant v. Ware.....	171, 193	Philips v. Morrison.....	754
Payson v. Macomber.....	260	Phillips v. Bowers.....	794
Peaceable v. Watson.....	739	Phillips v. Crawley.....	239
Peaceable d. Hornblower v. Read.	356	Phillips v. Fadden.....	268
Peacock v. Bell.....	446	Phillips v. Gregg.....	741
Peacock v. Pembroke.....	367	Phillips v. Harris.....	245
Pearce v. Atwood.....	266	Phillips v. Headlam.....	779
Pearce v. Chastain.....	467	Phillips v. Johnson.....	455
Pearce v. Hidrick.....	402	Phillips v. Thompson.....	166
Pearson v. Davis.....	500	Phoenix Ins. Co. v. Commonwealth	538
Pease v. Hirst.....	360	Phoenix Ins. Co. v. Floyd.....	700
Peck v. Denniston.....	794	Piatt v. Vattier.....	130
Peck v. Lockwood.....	766	Pickering v. Langdon.....	638
Peck v. Rorks.....	266	Picquet v. Swan.....	631
Pelham v. Page.....	499	Pierce v. Conant.....	401
Pelletreau v. Jackson.....	635	Pierce v. Goddard.....	586
Pelton v. Platner.....	243	Pierce v. McClellan.....	130
Pendergrast v. Foley.....	394	Pierce v. State.....	112
Pendleton v. Fay.....	661	Pierce v. Wannett.....	418
Pendleton v. Phelps.....	329	Pierson v. Gale.....	265, 267
Penns' Lessee v. Klyne.....	387	Pigg v. Corden.....	133
Penn and Meade's Trial.....	105	Pike v. Galvin.....	634, 635
Pennsylvania Co. v. Gallentine..	470	Pike v. Hanson.....	259
People v. Bristol.....	595	Pile v. McBratney.....	409
People v. City of St. Louis.....	671	Pillop v. Sexton.....	619
People v. Commissioners of Taxes.	587	Pillow v. Hardeman.....	562
People v. Corning.....	119	Pingray v. Washburn.....	393
People v. Crosswell.....	110	Pingree v. Hudson River Ins. Co.	716
People v. Cunningham.....	601	Pipe v. Smith.....	130
People v. Curling.....	374	Piscataqua B'k v. Turnley.....	303
People v. Fleming.....	368	Pitcher v. Livingston.....	500
People v. Jewett.....	151	Pitkin v. Long Island R. R.....	167
People v. Jocelyn.....	304	Pitts v. Bullard.....	389
People v. Johnson.....	409	Pitts v. Cable.....	402
People v. Lambier.....	795	Pitts v. Mower.....	723
People v. Platt.....	382	Plaisance's Estate.....	520
People v. Rynders.....	376	Planters' Bank v. White.....	562
People v. Tioga Common Pleas..	367	Platt v. Niles.....	269
People ex rel. Campbell v. Clark.	300	Plimpton v. Chamberlain.....	741
Peoria etc. R. Co. v. Neill.....	427	Plumleigh v. Dawson.....	794, 795
Perkins v. Cartmell.....	131	Plummer v. Webb.....	303
Perkins v. Conant.....	401	Poindexter v. Waddy.....	467
Perkins v. Eastern R. R.....	469	Polk v. Gallant.....	462
Perkins v. Fairfield.....	238	Polk's Lessee v. Wendal.....	390, 391, 404
Perkins v. Perkins.....	449	Pollard v. Baylors.....	546
Perkins v. Smith.....	178	Pollard v. Hagan.....	767
Perley v. Balch.....	143, 145, 505	Pomfret v. Ricroft.....	728, 733
Perrin v. Protection Ins. Co....	779	Ponder v. Mosely.....	449, 455
Perry v. De Wolf.....	520	Poole v. Symonds.....	554
Perry v. Middleton.....	416	Poor v. Taggart.....	267

	PAGE		PAGE
Porter's Case.....	94	Read v. Brookman.....	214
Porter v. Mount.....	401	Reading v. Com'wealth .167,604,	671
Porter v. Robinson.....	455	Rearich v. Swinehart....	172, 321
Porter v. Woods.....	480	Rector v. Hartt.....	275
Portlock v. Gardiner.....	130	Reed v. Austin's Heirs..	83, 462
Potter v. Brown.....	710	Reed v. McCrum.....	699
Potter v. Gardner.....	288	Reed v. Northfield.....	469
Potter v. Potter.....	423	Reed v. Noxon.....	438
Potts v. House.....	423	Reed v. Pratt.....	617
Poulk v. Slocum.....	263	Reed v. West.....	748
Poulton v. Lattimore....	144	Reeves v. Brymer.....	207
Poulton v. L. & S. W. R. R. Co.	261	Reeves v. Hogan.....	466
Poward v. North.....	296	Regina v. Light.....	268
Powell v. Deveny.....	560	Regina v. Richmond.....	169
Powell v. Rawlings.....	682	Reid v. Duncan.....	401
Powers, In re.....	268	Reilly v. Ringland.....	597
Pownal v. Taylor.....	395	Reist v. City of Goshen....	469
Pratt v. Bryant.....	593	Rembert ada. Kelly.....	229
Pratt v. Hill.....	264	Rerick v. Kern.....163, 166,	167
Prell v. McDonald.....	268	Ressler v. Peats.....	266, 267
Prentiss v. Savage.....	709	Rex v. Burdett.....	112
Prescott v. Hall.....	367, 368	Rex v. Dean of St. Asaph..	107
Prescott v. White.....	733	Rex v. Hunter.....	759
Prescott v. Williams.....	733	Rex v. Ins. Co.....	695, 697
President etc. of Mt. Vernon v.		Rex v. Johnson.....185,	373
Dusouchett.....	469	Rex v. Plummer.....	609
President etc. of Natchez v. Minor	577	Rex v. Raines.....	519
Preston v. City of Boston.....	717	Rex v. Scully.....	560
Preston v. Preston.....	132	Reynolds v. Orvis.....	263
Prevost v. Gratz.....	130	Rhines v. Phelps.....	595
Prewet v. Loony.....	53	Rhode Island v. Massachusetts..	235
Price v. Graham.....	269	Rice, In re.....	332
Priestley v. Johnson.....	589	Rice v. Barnard.....203,	333
Prigg v. Adams.....230,	232	Rice v. Davis.....	368
Prince v. Case...163, 164, 166,	167	Rice v. Gove.....	720
Prince v. Griffin.....	496	Rice v. Rice.....	488
Prinn v. Edwards.....	453	Rich v. Johnson.....	503
Pritchard v. Brown.....	502	Richardson v. Baker.....	133
Proctor v. Wells.....	769	Richardson v. Duncan.....	718
Proprietors v. Tiffany.....	637	Richardson v. Home Ins. Co..693,	695
Providence B'k v. Billings.....	238	Richardson v. Leavitt.....	576
Pruden v. Alden.....	217	Richardson v. Williams.....	415
Pulver v. Harris.....	367	Ricker v. Kelly.....163, 166,	167
Purden v. Alden.....	458	Ricketts v. Darrell.....	589
Purdy v. People.....	465	Ricketts v. Sisson.....	145
Purple v. H. R. R. Co.....	367	Ridout v. Langlands.....	638
Putnam v. Cushing.....	588	Rigg v. Wilton.....	419
Putnam v. Wyley.....	585	Ring v. Franklin.....	488
Putney v. Day.....166,	167	Ringgold v. Ringgold.....	594
Rabassa v. Orleans Nav. Co.....	345	Ripon v. Hobart.....48,	49
Radcliff v. Mayor of Brooklyn ..	483	Risher v. Roush.....	466
Radford v. Radford.....	521	Risley v. Phoenix Bank	367
Radney v. Vandebendy.....	286	Ritger v. Parker.....	748
Radnor v. Rotheran.....	286	Rivier v. Pugh.....	418
Rains v. McNairy.....	178	Roach v. Cosine.....	488
Rains v. Ware.....	191	Roath v. Driscoll.....	682
Ralston v. Hughes.....	449	Robert v. Traders' Ins. Co.....	690
Randall v. Van Vechten.....	342	Roberts v. Beatty.....	480
Ransom v. Mack.....	648	Roberts v. Burks.....	308
Rawlins v. Bailey.....417,	418	Roberts v. Stanton.....	657
Rawson v. McJunkin.....	368	Robertson v. Lain.....	619
Rawson v. Porter.....	717	Robertson v. Robertson.....	741
Rea v. Englesing.....	521	Robeson v. Roberts.....	368
		Robinson v. Byron.....	675

CASES CITED.

31

	PAGE		PAGE
Robinson v. Charleston.....	718	Sadler, <i>Ex parte</i>	202
Robinson v. Holt..591, 592, 593, 596		Sagar v. Eckert.....	588
Robinson v. Reynolds.....	621	Sager v. Portsmouth etc. R. R..	515
Robinson v. Weeks.....	367	Salmon v. Hoffman.....	299
Robinson v. White.....	368	Salter v. Sample.....	589
Roche v. Campbell.....	415	Sampson v. Gazzam.....	321
Rockwell v. Hubbell.....	392	Sanborn v. Southard.....	217
Rodgers v. McCluer's Adm'rs...	462	Sand's Ale etc. Co., <i>In re</i>	699
Rodgers v. Nowill.....	727	Sanderson v. Caldwell.....	205
Rodwell v. Phillips.....	160	Sands v. Taylor.....	140
Roe d. Saul v. Dawson.....	418	Satterfield v. Mayes.....	54
Rogan v. Walker.....	131	Satterlee v. Matthewson.....	238
Rogers v. Bradshaw.....	238	Saul v. His Creditors.....	199
Rogers v. Brent.....411, 512		Saulet v. Drenx.....	455
Rogers v. Charter Oak Life Ins. Co.....	320	Saunders v. Hendrix.....	502
Rogers v. Evans.....448, 633		Saunders v. Woods.....	53
Rogers v. Jones.....264, 769		Saunders' Heirs v. Saunders' Ex'rs.	653
Rogers v. Mulliner.....	263	Savage v. Stevens.....	205
Rogers v. Overton.....	470	Savoye v. Marsh.....	722
Rogers v. Saunders.....	496	Sawyer v. Fitts.....	416
Rogers v. Thomas.....	421	Scarlett v. Hunter.....	134
Roll v. City of Indianapolis.....	484	Schillinger v. McCann.....	502
Rollins v. Thompson.....	369	Schlencker v. Risley.....	304
Roman v. Strauss.....	682	Schneider v. McLane.....	268
Root v. Bonnema.....	592	Schofield v. Iowa Homestead Co.	503
Root v. Pinney.....	401	School Directors v. James.....	58
Rose v. Beatie.....	141	Schooner Reeside.....	316
Rose v. Bevan.....	595	Schoppenhast v. Bollman.....	409
Rose v. Oliver.....	205	Schrader v. Decker.....	172
Rose v. Poulton.....	342	Schroeppel v. Corning.....401, 402	
Ross v. Barker.....	417	Scircle v. Neeves.....	268
Ross v. City of Madison.....	483	Scott v. Bealls.....	415
Ross v. Milne.....	345	Scott v. Ely.....	264
Rosser v. Bingham.....	462	Scott v. Fields.....	494
Rosser v. Franklin.....	423	Scott v. Harkins.....	368
Rosser v. Randolph.....	351	Scott v. Renick.....	145
Roth v. Smith.....265, 270		Scott v. Searles.....	498
Roth v. Wells.....	593	Scott v. Shearman.....	236
Rous v. Noble.....	519	Scott v. Waller.....	449
Roussel v. St. Nicholas Insurance Co.....	699	Scroggins v. Hoadley.....	393
Rowe v. Billing.....	651	Scudder v. Trenton Del. Falls Co.....	351
Royce v. Strong.....	82	Seaman v. Patten.....	229
Royston v. Wear.....	417	Searls v. Vieto.....	259
Rucker v. Abell.....	438	Seaton v. Benedict.....	491
Ruddell v. Walker.....	215	Seguin v. Debon.....	480
Ruffin, <i>Ex parte</i>.....335, 336		Selleck v. French.....	480
Ruffner v. Williams.....	259	Seller v. Walker.....	486
Ruggles v. Hall.....	302	Seller's Lessee v. Corwin.....	296
Rung v. Shonebergar.....	351	Selma & T. R. R. Co. v. Tipton.....	198, 345
Rupert v. Mark.....417, 418		Semple v. Anderson.....441, 445	
Rush County Commissioners v. Stubbs.....	588	Sergeant v. Bigelow.....	130
Rushing v. Rhodes.....	401	Settle v. Alison.....188, 455	
Russell v. Hugunin.....	83	Sewing Machine Cos, Case of....	423
Russell v. Jackson.....	735	Sexton v. Gee.....	368
Russell v. Shuster.....	268	Seymour v. Wyckoff.....	592
Russell v. Lewis.....	488	Shaefer v. Gates.....	442
Rutledge v. Lawrence.....	500	Shand v. Henderson.....	238
Rutter v. Blake.....	146	Shanks v. Lancaster.....357, 720	
Ryan v. Adamson.....	698	Shanley v. Wells.....	268
Ryder v. Hathaway.....	594	Shaw v. Jayne.....	269
Rivers v. Wheeler.....	416	Shaw v. Reed.....	266
		Shearer v. Clay.....	387

	PAGE		PAGE
Sheehy v. Mandeville	158	Smith v. Buchanan.....	710
Sheets v. Culver.....	150	Smith v. Clay.....	130, 131
Sheets v. Andrews.....	500	Smith v. Columbia Ins. Co..	693, 695
Sheldon v. Hartford F. Ins. Co..	320	Smith v. Coopers.....	401, 490
Sheldon v. Hill	263, 266	Smith v. City Council.....	484
Sheldon v. Hurd.....	368	Smith v. Dickinson.....	299
Sheldon v. Kibbe.....	205	Smith v. Gibbs.....	215
Sheldon v. Quinlen.....	426	Smith v. Hampton.....	133
Shellard v. Harris.....	601	Smith v. Hornback.....	545, 546
Shelmire v. Thompson.....	465	Smith v. Huntington.....	245
Shelton v. Cocke.....	360	Smith v. Jones.....	300
Shelton v. Gill.....	401	Smith v. Lasher.....	465
Shepard v. Ogden.....	441	Smith v. Ludlow.....	360
Shephard v. Little.....	502	Smith v. Maryland.....	769
Sherby v. Fagg.....	287	Smith v. Morrill.....	593
Sherban v. Commonwealth.....	378	Smith v. Mundy.....	176
Sherman v. Ballou.....	442	Smith v. Pettingill.....	681
Sherman v. Elder.....	367	Smith v. Rice.....	442
Sherwood v. General Mut. Ins. Co.....	786, 788	Smith v. Rines.....	205
Shields v. Shields.....	519, 520	Smith v. Sanborn.....	594
Shilton, in the Goods of.....	520	Smith v. Sherwood.....	546
Shipley v. Ritter.....	682	Smith v. Slocomb.....	794
Shirras v. Caig.....	288, 289	Smith v. Smith.....	715
Shockley v. Shockley.....	401	Smith v. State.....	582
Shoemaker v. Simpson.....	589	Smith v. Tupper.....	243
Shorter v. Smith.....	130	Smith v. Vanderhost.....	480
Shumway v. Rutter.....	593	Smith v. Ward.....	393
Shumway v. Stillman.....	460	Smith v. Welch.....	593
Sibley v. Holden.....	681, 793	Smith v. Woodward.....	214
Sibley v. Howard.....	148	Smith v. Young.....	522
Sickels v. Pattison.....	480	Smith v. Zent.....	454
Sidener v. Galbraith.....	480	Smith d. Teller v. Burtis.....	356
Sigourney v. Drury.....	360	Smith d. Teller v. Lorillard.....	356
Sikes v. Basnight.....	198	Smith & Ogden's Trial.....	110
Silbury v. McCoon.....	586	Snell v. Moses.....	140
Sill v. McKnight.....	519	Snell v. Snow.....	741
Simmon v. Jenkins.....	596	Snyder v. Vancampen.....	276
Simmons v. Gutteridge.....	655	Snyder v. Vaux.....	586
Simmons v. Jenkins.....	595	Society v. Morris Canal Co..	351, 794
Simonds v. Pollard.....	80	Somerset v. Fogwell.....	766
Simpson v. Hand.....	305, 308, 469	Somerville v. Freeman.....	134
Sims' Lessee v. Irvine.....	387	Somes v. Skinner.....	635
Sims v. Glazener.....	591	Sorenson v. Dundes.....	259, 270
Simson v. Hart.....	287	South Australian Ins. Co. v. Ran- dell.....	588, 590
Singleton v. Ake.....	418	Southerland v. Jackson.....	637
Singstack v. Harding.....	300	Southworth v. Isham.....	596
Skellern's Ex'r v. May's Ex'r.	230, 442	Sparhawk v. Russell.....	324
Skinner v. Moore.....	150	Spaulding v. Farwell.....	130
Skinner v. White.....	287	Spear v. Carter.....	433, 448
Slade's Case.....	98	Spence v. Union M. Ins. Co.....	595
Slaughter v. Commonwealth.....	582	Spring v. Chase.....	503
Slaughter v. Green.....	587	Springfield Ins. Co. v. Allen.	696, 697
Slee v. Manhattan Co.....	488	Springstein v. Schermachorn....	326
Sleeth v. Murphy.....	250	Spurlin v. Millikin.....	401
Sleight v. Leavenworth.....	265, 267	Spurlock v. Sproule.....	132
Sleight v. Ogle.....	266, 270	Squires v. Riggs.....	416
Slomer v. People.....	266	Staats v. Ten Eyck.....	500
Smilie v. Biffle.....	395	Stackhouse v. Barnston.....	130
Smith v. Black.....	158	Stackpole v. Arnold.....	194
Smith v. Blatchford.....	715	Stamps v. Commercial F. Ins. Co.	698
Smith v. Blythewood.....	649	Stanhope v. Fermin.....	617
Smith v. Britton.....	132, 137	Stanton v. Schell.....	264, 265
Smith v. Brush.....	287	Stanton v. Seymour.....	269

	PAGE		PAGE
Staples v. Franklin Bank.....	648	Stockton v. Frey	649
Starbuck v. Murray.....	617	Stoddard v. Benton.....	368
Stark v. Parker.....	480	Stoeever v. Whitman's Lessee.....	316
Starr v. Pease.....	430	Stokes v. Lebanon and Spartan	
Starr v. Robinson.....	393	Tp. Co.....	131
Starr v. Winegar.....	591	Stone v. Carlan.....	727
State v. Allen.....111,	119	Stone v. Dickinson.....205,	266
State v. Atkinson.....	60	Stone v. Graves.....	243
State v. Bittinger.....	607	Stone v. Marsh.....	304
State v. Clenny.....	60	Storer v. Freeman.....707,	769
State v. Cooper.....582,	614	Story v. Windsor.....	288
State v. Crank.....	378	Stothart v. Parker.....	216
State v. Creight.....	151	Stout v. Vankirk.....	368
State v. Dayton.....	170	Stovall v. Farmers' etc. Bank of	
State v. Gilbert.....	85	Memphis.....	290
State v. Graves.....	589	Stoyel v. Lawrence.....	266
State v. Green.....	648	Strange v. Whitehead.....	271
State v. Hodgeson.....	85	Strass v. Murtief.....	198
State v. Jacob.....	595	Strawbridge v. Robinson.....	115
State v. James.....	267	Strech v. Schenck.....	134
State v. Jones.....111,	151	Street v. Augusta Mut. Ins. Co..	790
State v. Lehre.....	119	Street v. Blay.....	144
State v. Mayberry.....	614	Streeter v. People.....	423
State v. Miller.....	374	Streshley v. Fisher.....	264
State v. Nixon.....	379	Strider v. Reid's Adm'r.....	121
State v. Parrish.....	764	Striker v. Mott.....	547
State v. Smith.....92, 378,	614	Strong v. Manufacturers' Ins. Co.	693
State v. Snow.....	111	Strong v. Stewart.....	488
State v. Solomons.....	119	Stroup v. Sullivan.....	466
State v. Spencer.....	60	Struber v. Trustees of Cincinnati	
State v. Thompson.....	137	Ry.....	586
State v. Trask.....	752	Stubblefield v. McRaven.....	657
State v. Wilson.....	382	Stubbs v. Page.....	500
State Bank v. Campbell.....	466	Sturges v. Beach.....	380
State Bank v. Ensminger.....	401	Sturges v. Crowingshield.....	382
Stearns v. Fiske.....	522	Stuyvesant v. Woodruff.....	748
Stearns v. Quincy Mut. Ins. Co.		Suffolk Ins. Co. v. Boyden..694,	697
.....	698, 699	Sugg v. Poole.....	270
Steel v. Alan.....	619	Sullivan v. Deadman.....	243
Steele v. Worthington.....	502	Sullivan v. Jones.....	589
Steelman v. Sheeseman.....	454	Sumner v. Hamlet.....583,	588
Steigleman v. Jeffries.....	146	Sumner v. Pacific R. R. Co.....	130
Stephan v. Daniels.....	718	Sumner v. Powell.....	326
Stephens v. Briggs.....	587	Sumner v. State.....378,	582
Stephens v. Elwall.....	178	Sumner v. State.....	582
Stephens v. Santee.....	587	Susquehanna Canal Co. v. Wright	167
Stephenson v. Little.....	592	Sussex etc. Ins. Co. v. Royal Ins.	
Stephenson v. Stephenson.....	521	Co.....	697
Sterling v. Peet.....	500	Sussex etc. Ins. Co. v. Woodruff.	695
Stetson v. Kempton.....	538	Sutcliffe v. State.....582,	614
Stevens v. State.....538, 643,	670	Sutherland v. Governor.....	604
Stevens v. Stevens.....	167	Sutherland v. Lishnan.....	342
Stevens v. Whistler.....	637	Swan's Case.....	584
Stevenson v. McReary.....	357	Swart v. Service.....	489
Stewack v. Brooks.....	268	Swartz v. Swartz.....	412
Stewart's Appeal.....	518	Swearingen v. Gulick.....	449
Stewart v. Ball.....	585	Swett v. Colgate.....	145
Stewart v. Spier.....	417	Swiggart v. Harbor.....158,	242
Stewart v. Stokes.....	134	Swindler v. Hillard.....	515
Stinchfield v. Milliken.....696,	698	Switzer v. Skiles.....249,	577
Stiver v. Stiver.....	654	Sylvester v. Smith.....	65
St. John v. Holmes.....	427	Symmes v. Symonds.....	286
St. Louis etc. Ins. Co. v. Cohn..	406		
St. Louis Ins. Co. v. Glasgow... 787		Taft v. Montague.....	490

	PAGE		PAGE
Taintor v. Prendergast.....	723	Tomlinson v. Thompson.....	589
Tanner v. Trustees of Albion....	351	Tompkins v. Hill.....	401
Tapley v. Lebeaume.....	500	Tonawanda R. R. Co. v. Munger	
Tate v. Bell.....	393	.....	74, 469
Taylor v. Waters.....	161, 165	Toomer v. Purkey.....	176
Tayloe v. Thompson.....	280	Torbert v. Lynch.....	269
Taylor v. Boyd.....	455	Touhey v. King.....	268
Taylor v. Bradshaw.....	466	Tourville v. Naish.....	288
Taylor v. Columbian Ins. Co....	716	Towell v. Gatewood.....	145
Taylor v. Commonwealth.....	174	Tower's Appropriation.....	462
Taylor v. Galloway.....	657	Town v. Wood.....	401
Taylor v. Jones.....	593	Town Council of Akron v. Mc-	
Taylor v. Longworth.....	494	Comb.....	483
Taylor v. Peyton's Adm'r.....	213	Town of Elkhart v. Ritter.....	469
Taylor v. Porter.....	404, 489	Townsend's Case.....	113
Taylor v. Snyder.....	217	Townsend v. State.....	111, 112
Taylor v. Strong.....	268	Townsend v. Townsend.....	393
Taylor v. Trask.....	265	Trafton v. Alfred.....	756
Taylor v. Whitehead.....		Trammell v. Russellville.....	266
.....	728, 732, 733,	Trask v. Payne.....	262
Teagarden v. Graham.....	262	Treat v. Barber.....	593
Tebbetts v. Pickering.....	716, 723	Triebet v. Colburn.....	409
Tenison v. Martin.....	181	Trion v. Emerick.....	415
Ten Eyck v. Delaware and R.		Tripp v. Riley.....	591
Canal Co.....	794	Troup v. Woods.....	368
Terrett v. Taylor.....	382	Troy etc. Factory v. Winslow...	332
Territory v. McFarlane.....	151	Truax v. Thorn.....	414, 416
Territory v. Valdez.....	522	Trull v. Eastman.....	635
Thalhimer v. Brinckerhoff.....	307	Trumbull v. Gibbons.....	423
Thayer v. Brooks.....	795	Truscott v. Carpenter.....	239
Thayer v. McKee.....	457	Trustees v. Bradbury.....	393
Thayer v. Turner.....	140	Trustees v. Foy.....	393
Thomas v. Marshall.....	387	Trustees of Bishop's Fund v.	
Thomas v. Orrell.....	415, 416, 418	Rider.....	382
Thomas v. Patten.....	637	Trustees of Wabash etc. Canal	
Thomas v. Sorrell.....	161	Co. v. Spears.....	484
Thomas v. Thomas.....	404	Tucker Mfg. Co. v. Fairbanks ..	720
Thomas' Ex'rs v. Von Kapff's		Turpin v. Turpin.....	467
Ex'rs.....	698, 699	Tryon v. Carlin.....	417
Thompson's Estate.....	518	Tyree v. Williams.....	496
Thompson v. Ellsworth.....	267, 271	Tyler v. Hammond.....	793
Thompson v. Gregory.....	161	Tyler v. Sturdy.....	752
Thompson v. Mawhinney.....	741	Tyson v. Simpson.....	585
Thompson v. Miller.....	191		
Thompson v. Reed.....	480	Ulrich v. Litchfield.....	404
Thompson v. Reynolds.....	790	Underwood v. Jackson.	415, 416
Thompson v. Tolmie.....	238	Underwood v. Stuyvesant.....	673
Thompson v. Ware.....	402	Union Canal Co. v. Young.....	503
Thorne v. Colton.....	594	United Soc. of Shakers v. Under-	
Thornhill v. Bank of Louisiana..	716	wood.....	205
Thornton v. Enterprise Ins. Co..	696	United States v. Arredondo. 238,	410
Thornton v. Wynn.....	144	United States v. Battiste.....	93
Thorpe v. Jackson.....	326	United States v. Gibert.....	114
Threadgill v. Timberlake.....	402	United States v. Hill.....	762
Threlkelds v. Campell.....	455	United States v. Lapoint.....	269
Thwing v. Great Western Ins. Co.	790	United States v. Morrison.	280
Tiernan v. Poor.....	660	United States v. Moulton.....	186
Tingley v. Bateman.....	632	United States v. Ross.....	609
Tisdale v. Harris.....	502	United States v. The Pirates...	376
Tison v. Yawn.....	404	United States v. Wilson.....	110
Titram v. Williams.....	130	Union Bank v. Meeker.....	194
Titus v. Maher.....	589	Union Bank v. Powell.....	427
Todd v. McGhee.....	416		
Toledo etc. R. Co.....	449	Vail's Appeal.....	333

CASES CITED.

35

	PAGE		PAGE
Van Alstyne v. Spraker.....	416	Ward v. Henry.....	598
Van Bracklin v. Fonda.....	140	Ward v. Ringo.....	192
Van Campen v. Snyder.....	83	Ward v. Sharp.....	87, 88
Vance's Heirs v. McNairy.....	462	Ward v. State.....	760
Vanderbilt v. Eagle Iron Works.	476	Ward v. Aeyre.....	591
Vanderpool v. State.....	268	Warder v. Fisher.....	146
Van Densen v. Blum.....	475	Ware v. Barataria etc. Canal Co.	560
Van Densen v. Newcomer.....	261	Ware v. Bennett.....	401
Vanderveer v. Mattocks.....	268	Ware v. Brookhouse.....	741
Van Fossen v. Pearson.....	418	Waring v. Loder.....	698
Van Gorden v. Jackson.....	356	Waring v. Mason.....	140, 141
Van Hern v. Taylor.....	308, 787	Waring v. Smyth.....	489
Van Hoesen v. Van Alstyne		Warne v. Constant.....	267
.....215, 216,	646	Warner v. Commonwealth.....	378
Vanhorn's Lessee v. Chesnut....	387	Warner v. Cushman.....	590
Van O'Linda v. Lothrop.....	638, 793	Warner v. Reddiford.....	259
Van Raugh v. Van Arsdaln.....	715	Warren v. Matthews.....	765, 766
Van Rensselaer v. Jones.....	416	Washburn v. Merrills.....	488
Van Voorhees v. Leonard.....	259	Washington Bridge Co. v. Stew-	
Vattier v. Hinde.....	288, 289, 661	art.....	442
Vaughn v. Brown.....	296	Wasson v. Canfield.....	264
Vaughn v. Law.....	48	Water Lot Co. v. Bucks.....	349
Very v. McHenry.....	700	Waterman v. Soper.....	585, 586
Vick v. Vicksburg.....	547	Waterman v. State.....	269
Vigors v. Pike.....	130	Waterman v. Tuttle.....	449
Von Latham v. Libby.....	265	Waters v. Merchants' Louisville	
Von Latham v. Rowan.....	265	Ins. Co.....	779
Voorhees v. Bank of United States.	242	Waters v. Travis.....	134
Voorhees v. Earl.....	146	Watkins, <i>Ex parte</i>	232
Vourhies v. Demeyer.....	134	Watkins v. Gregory.....	488
Vose v. Martin.....	296	Watson v. Gregg.....	357, 741
Vose v. Morton.....	463, 668	Watson v. Hill.....	416
Vredenburg v. Hendricks.....	265	Watson v. Reid.....	133
Vreeland v. Hyde.....	646	Watson v. Reisig.....	438
Vrooman v. Ward.....	416	Watson v. Stever.....	90
		Watts v. Waddlo.....	133
Waddell v. Glassell.....	194, 211	Wane Co. Turnpike Co. v. Berry	469
Wade v. Kalbfleisch.....	367	Weatherby v. Covington.....	554
Wade's Heirs v. Greenwood.....	457, 741	Weatherhead v. Boyers.....	402
Wadhams v. Gay.....	455	Weaver v. Davis.....	409
Wadleigh v. Town of Sutton.....	479	Web v. Paternoster.....	161, 165
Wagner v. Baird.....	130, 131	Webb v. Hynes.....	357
Wagstaff v. Schippel.....	265	Webb v. Wilshire.....	401
Wait v. Green.....	263	Webber v. Kenny.....	265
Wakefield v. Goudy.....	441	Webster v. Power.....	595
Wakely v. Hart.....	270	Weigley v. Weir.....	502
Waldron v. Willard.....	367	Weil v. Silverstone.....	593
Walker v. Boston & Hope Ins. Co.	790	Weir v. Pennington.....	368
Walker v. Emerson.....	133	Weire v. City of Davenport.....	367
Walker v. Maitland.....	779	Welch v. State.....	378
Walker v. Simpson.....	492	Weld v. Bartlett.....	175
Walker v. Wells.....	404	Welland Canal Co. v. Hathaway	198
Wall v. Cloud.....	48	Wellar v. People.....	582
Wallace v. Cox.....	449	Wells v. Mason.....	443
Wallace v. Duffield.....	356	Wells v. Robinson.....	88
Wallace v. Maxwell.....	357	Wells v. Smith.....	494, 496
Wallace v. Miller.....	205	Wells v. Thompson.....	431
Wallwyn v. Lee.....	286, 287	Welsh v. Carter.....	145
Walsh v. Durkin.....	453	Wenman v. Mohawk Ins. Co.....	649
Walsh v. Whitcomb.....	248	West v. Cunningham.....	115
Walton v. Cody.....	146	West v. Kelly.....	172, 211
Walton v. Cromly.....	487, 489	West v. Meddock.....	401
Walton v. Robinson.....	369	Westchester F. Ins. Co. v. Foster	698
Ward v. Harrison.....	416	Westmoreland v. Dixon.....	145

	PAGE		PAGE
Weston v. Alden.....	793	Willard v. Rice.....	598
Weston v. Emes.....	316	Willetts v. Chambers.....	358
Weston v. Sampson.....	789	Williams v. Glenister.....	288
Wetherbee v. Green.....	586	Williams v. Hogeboom.....	155
Wetmore v. White.....	165	Williams v. Hollingsworth.....	462
Wharton's Case.....	103	Williams v. Houghtaling.....	490
Wheatley v. Miscal.....	479	Williams v. Ivey.....	269
Wheaton v. Beecher.....	266	Williams v. Mattocks.....	133
Wheaton v. Hibbard.....	88, 401	Williams v. Merle.....	505
Wheaton v. Sexton.....	275	Williams v. Moray.....	470
Wheelden v. Wilson.....	596	Williams v. Mostyn.....	78
Wheeler v. Factors' etc. Ins. Co.	698, 699	Williams v. Preston.....	460
Wheeler v. Raymond.....	447	Williams v. Roger Williams Ins. Co.....	693
Wheelock v. Doolittle.....	361	Williams v. Safford.....	729, 732, 734
Whitaker v. Morrison.....	557, 648	Williams v. Saunders.....	58
Whitaker's Adm'r v. English.....	205	Williams v. Slaughter.....	145
Whitbread v. Jordan.....	663	Williams v. Tipton.....	599
Whitcomb's Case.....	763	Williams v. Williams.....	130, 657
Whitcomb v. Whiting.....	360	Williamson v. Cole.....	401
White v. Bennett.....	133	Williamson v. Farrow.....	300
White v. Brooks.....	590	Williamson v. Williamson.....	393
White v. Brown.....	696, 697	Willie v. Green.....	401
White v. Canfield.....	716	Willington v. Gale.....	489
White v. Chapin.....	748	Willion v. Berkeley.....	113
White v. Hale.....	360	Willis v. Henderson.....	400
White v. Morton.....	741	Willson v. Whitfield.....	518
White v. Palmer.....	617	Willoughby v. Willoughby.....	286
White v. Pamther.....	130	Wilmarth v. Burt.....	266
White v. Philbrick.....	206	Wilson v. Chalfant.....	163, 166
White v. Phillipston.....	756	Wilson v. Chandler.....	418
White v. St. Guirons.....	415, 418	Wilson v. Cooper.....	588, 590
White v. Skinner.....	343	Wilson v. Forbes.....	500
White v. Spettigue.....	304	Wilson v. Mackenzie.....	263
White v. White.....	58	Wilson v. Mason.....	288
White v. Williams.....	291	Wilson v. Mayor of N. Y.	243, 756
Whiteford v. Burckmyer.....	308	Wilson v. Nason.....	591
Whiteford v. Commonwealth.....	582	Wilson v. Robinson.....	265
Whitehead v. Henderson.....	406	Wilton v. Tazwell.....	431
Whitehead v. Peck.....	401	Wilson v. Turpin.....	660
Whitehouse v. Frost.....	590	Wilson v. Wilson.....	770
White Lead Co. v. Rochester....	483	Winford v. Powell.....	447
Whitman v. Young.....	55	Wing v. Hurlburt.....	492, 770
Whitmarsh v. Walker.....	164	Winkworth v. Man.....	416
Whitmore v. Allen.....	270	Winstanley v. Meacham.....	417, 419
Whitney v. Haven.....	316	Winter v. Brockwell.....	161, 162, 163, 507
Whitney v. Stanson.....	367	Winter v. Jones.....	386
Whittaker v. Morrison.....	217	Wise v. Withers.....	239
Whittaker v. Pope.....	401	Witherington v. McDonald.....	404
Whittier v. Cocheco Mfg. Co....	795	Withers v. Carter.....	462
Wigg v. Wigg.....	288	Withers v. Henley.....	267
Wiggin v. Boardman.....	316	Witherspoon v. Dunlap.....	763
Wilburn v. Larkin.....	720	Witter v. Richards.....	334, 337, 338
Wilde v. Baker.....	719	Wood's Estate.....	668
Wilder v. Keeler.....	203, 333	Wood v. Ash.....	585
Wiley v. Keokuk.....	270	Wood v. Colvin.....	83
Wiley v. Starbuck.....	607	Wood v. Fales.....	589, 592
Wilkerson v. Goldthwaite.....	191	Wood v. Goodridge.....	720
Wilkes v. Jackson.....	205	Wood v. Gray.....	402
Wilkins v. Hall.....	270	Wood v. Gunston.....	98
Wilkins v. Harriss.....	519	Wood v. Hartford F. Ins. Co. ...	314, 320, 538
Wilkinson v. Henderson.....	326	Wood v. Jackson.....	456, 546
Wilkinson v. Scott.....	502		
Wilks v. Back.....	720		

CASES CITED.

37

	PAGE		PAGE
Wood v. Kenny.....	401	Wright v. Hughes.....	466
Wood v. Lake.... 161, 163, 165,	402	Wright v. Lathrop.....	205
Wood v. Lane.....	260	Wright v. Levy.....	368
Wood v. Leadbitter....160, 161,	165	Wright v. Walden & M. R. R. Co.	74
Wood v. Manley.....	164	Wright v. Nagle.....	393
Wood v. Mears.....	470	Wright v. O'Brien.....	587
Wood v. Sparks.....	520	Wright v. Parks.....	368
Wood v. Wallace.....	368	Wright v. Turner.....	480
Wood v. Wood.....519, 520		Wright v. Wright.....	478, 522
Woodbury v. Parshley.....	161	Wyatt v. Hodson.....	360
Woodbury v. Short.....	795	Wyman v. Mayor etc. of N. Y....	673
Woodbury Savings B'k v. Charter		Wynn v. Wyatt's Adm'r.	123
Oak Ins. Co.....	320	Wynne v. Wynne.....	280
Woodcock v. Bennet.	284, 455		
Woodford v. McKenzie.....	449	Yancey v. Downer.....	467
Woods v. State.....	259	Yates v. Boen.....	618
Woodside v. Woodside.....	423	Yates v. Lansing.....	263
Woodward v. James.....	423	Yeates v. Pryor.....	248
Woodward v. Seeley.....166, 167		Young v. Craig.....	210
Woodward v. Washburn.....	269	Young v. Drew.....	416
Woolfolk v. Bird.....	401	Young v. Herbert.....	229
Wooster v. Parsons.....	266	Young v. Miles.....	591
Worland v. Kimberlin.....	438	Young v. Scott.....	397
Wormley v. Wormley.....	288	Young v. Spencer.....	79
Worrall v. Parmelee.....	741	Young v. The King.....	376
Worth v. Northam.....	586	Young v. ———.....728, 733	
Worthy v. Johnson.....	394		
Wragg, <i>Ex parte</i>	615	Zeback v. Smith.....	657

AMERICAN DECISIONS.
VOL. LIV.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

MOFFATT v. BUCHANAN ET AL.

[11 HUMPHREYS, 369.]

ONE PURCHASING FOR ANOTHER AT EXECUTION SALE, having agreed to so purchase, and hold the property as security for the money, is a trustee, and the contract is a mortgage.

TRUSTEE, BY ASSERTING ADVERSE RIGHT TO PROPERTY, can not divest himself of the character of trustee, nor vest title in himself until after the statute of limitations has run.

ADVERSE POSSESSION BY PERSONAL REPRESENTATIVE dates from the commencement of his own adverse possession, and not from that of the decedent.

BILL in chancery. Decree for complainant. Defendant appealed. The opinion states the facts.

W. F. Cooper and Washington, for the complainant.

Wright and Fogg, for the defendants.

By Court, **TOTTEN, J.** The bill was filed the thirteenth of April, 1848, in chancery at Fayetteville, to recover possession of a negro slave Sam.

The material facts are these: There was an execution in favor of *John McCullom v. Moses and Robert Buchanan*, for about one hundred and sixty-five dollars, for which complainant William Moffatt was originally liable—this execution was levied on the slave Sam, then probably in the possession of Robert Buchanan, and at and before the sale, which was on the twenty-sixth of December, 1842, there was an agreement between complainant and Moses and Robert Buchanan to the following effect: Moses had in possession of Robert Buchanan, one hundred dollars in Ala-

bama money, then at a discount of eleven per cent., which Moses agreed to let complainant have, and with the aid of this fund said Robert was to buy in the slave and hold him in possession until complainant should pay to said Robert the balance on the execution and the discount on the Alabama money, and then should deliver the slave to complainant. Moses was the son of Robert Buchanan and the son-in-law of complainant, who was old and destitute, but had been in better circumstances and had been the owner of the slave, and it was the wish of Moses Buchanan to assist his father-in-law, that he might have some one to wait upon him. Robert Buchanan, concurring in the same purpose, agreed to purchase the slave as before stated, and hold him subject to said agreement; and accordingly, on the twenty-sixth of December, 1842, the slave was bid for by said Robert and purchased at about one hundred and sixty-five dollars, he being worth at that time about four hundred dollars. The bill charges that Robert Buchanan had repurchased the slave from one Alfred Smith for the benefit of Moses Buchanan and with his funds, but this fact is not made out in the proof. There is a quitclaim conveyance from Smith to said Robert, and it is probable, from some imperfect admissions in the answer, that after the purchase from Smith, the slave was sometimes in possession of Moses Buchanan. One of the witnesses (Alfred Smith) states, that in the summer of 1843, complainant demanded the slave of said Robert in virtue of said agreement, saying that he could have the money at any time, but said Robert refused to deliver him, stating as a reason, that the one hundred dollars before named had been taken by garnishment, that is, as we understand it, for the debts of Moses Buchanan. It is proved by another witness, that on the twenty-seventh of February, 1844, complainant tendered to said Robert one hundred and fifty dollars, that he might take the amount due him on account of the purchase of the slave, and it seems that the balance due, after crediting the one hundred dollars, was about sixty-five dollars and the discount before mentioned. But said Robert retained the slave until his (said Robert's) death, on the nineteenth of July, 1845, and Milton Buchanan, his administrator with the will annexed, has retained the slave in possession ever since.

Now the transaction is, in effect, simply this—said Robert was to purchase and hold the slave for complainant, applying thereto the one hundred dollars already in his hands, and advancing for complainant the balance on the purchase, to secure

the repayment of which he was to retain the slave in possession until refunded by complainant. The price given, being merely the amount of the debt and less than half the value of the slave, is a circumstance in confirmation of the other proof, as it may be inferred that other persons had a knowledge of the transaction, and on that account declined bidding at the sale.

The title was therefore acquired and held by said Robert, under an express trust, the terms of which are to be seen in said agreement; and inasmuch as he was to hold it as indemnity for the money advanced, the trust is in nature of a mortgage. In *Lloyd v. Currin*, 5 Humph. 464, it was held that if before a sale under execution there is an agreement that the creditor shall acquire by purchase at the sale the legal title to the property, and hold it as security for his money, such contract is a mortgage, notwithstanding he acquired the title, not by conveyance of the debtor, but by purchase at the execution sale. To the same effect is the case of *English v. Tomlinson*, 8 Id. 378. The trust is express where it is created by the act of the parties, and it may be either by word or writing: *Cook v. Fountain*, 3 Swans. 585.

If this be the true construction of the agreement, it is not true, as argued, that complainant was under no obligation to pay the balance of the money and take the slave: it was certainly in the power of Robert Buchanan, holding as a trustee and partly for his own benefit, to enforce complainant to comply with his part of the agreement, and to close the transaction. Nor is it true that the death of the slave would have been the loss of the trustee, his interest being merely a debt secured by holding the legal title.

As to the statute of limitations relied upon in defense; conceding that it will apply after the trustee had repudiated the trust, and asserted an adverse title in himself, and that fact made known to the *cestui que trust*, what then will be its effect in the present case? Regarding said Robert in the character of a trustee, he had no right to the slave as against the *cestui que trust*, but held him only as security for the money advanced. In the view of a court of equity, the slave is to be considered as the property of the *cestui que trust*, subject to a lien for a debt, due in the present case to the trustee. The assertion of an adverse right to the slave was therefore wrongful, and could be of no avail to divest the said Robert of his rightful character as trustee, and vest in him an absolute title to the slave, until after the lapse of the time limited by the statute; after such time, it would have that effect.

Conceding that the adverse possession commenced in 1843, and there is no pretense that it commenced at an earlier period, yet as said Robert died on the nineteenth of July, 1845, before the lapse of the three years, it had not then conferred upon him a right to the slave in his new character of absolute owner. And at his death the title that he had was his original title as trustee, and a security for his money. Such title as he had went of course to his personal representative, and as the adverse possession, for less than three years, had produced no change in the title, the representative would necessarily hold by the only title that had any existence, that is, in trust under the agreement of the parties. The slave did not therefore come to the executor as assets of the estate, subject to be administered under the will. The law presumes his possession to be in conformity to the right, but if the executor set up an adverse claim, it is upon his own possession, and being wrongful, can not connect itself with the wrongful possession of the testator, so as by lapse of time to acquire, as executor, a title that had no existence, and was not assets in his possession at the death of the testator.

Norment v. Smith, 1 Humph. 47, was decided upon the principle here stated. That case was a bill to recover the possession of a slave, and the defense was the act of limitation. The slave had been in the possession of Samuel G. Smith, under a claim of title, and at his death came to the possession of Thomas Smith, his executor. And the question was, whether the executor could connect his possession with that of the testator, so as to make out his defense upon the act of limitations, and it was held that he could not. Green, J., in delivering the opinion of the court, observes that, "as the property in the slave had not been vested in Samuel G. Smith, the defendant does not hold him as executor, but is personally guilty of an unlawful detainer, for which he is liable in this suit. The present cause of action commenced with the possession of the slave by the defendant." And referring to *Newsum v. Newsum*, 1 Leigh, 86 [19 Am. Dec. 739], and *Jones v. Littlefield*, 3 Yerg. 133, he further says: "These cases show, that an executor has no right to take into his possession a chattel, to which his testator was not entitled, though such testator had been in possession thereof, and consequently he can not connect his possession with that of his testator."

Without extending the discussion further, we are of opinion that the act of limitation does not apply in the present case.

The decree of the chancellor will be affirmed.

RESULTING TRUST IN BUYING LAND FOR ANOTHER arises where a person agrees verbally to bid in land for another at a sheriff's sale, and he will be bound and decreed to hold in trust, though he take the conveyance in his own name; and the plea of the statute of limitations will not avail when he has tendered an account in which he has charged the other with the amount of the purchase money: *Denton v. McKenzie*, 1 Am. Dec. 664. But it is otherwise if the acknowledgment of the trust or the charge to the other party be not made: *Mowke v. Slaughter*, 13 Id. 133.

ADVERSE POSSESSION BETWEEN TRUSTEE AND BENEFICIARY can not exist where the trust is express: *Miller v. Bingham*, 36 Am. Dec. 58, and note. But where a party takes possession in his own right, implied trusts are subject to the operation of the statute of limitations: *Haynie v. Hall's Ex'r*, 42 Id. 427, and note to *Collins v. Loftus*, 34 Id. 724, 725.

"TACKING" SUCCESSIVE POSSESSIONS TO MAKE OUT TITLE BY ADVERSE POSSESSION: See *Casey's Lessee v. Inloes*, 39 Am. Dec. 658, and note 687, where other cases in this series are collected: *Melvin v. Proprietors of Locks, &c.*, 38 Id. 384, and note.

KIRKMAN v. HANDY.

[11 HUMPHREYS, 406.]

LIVERY STABLE IS NOT NUISANCE *per se*, and a court of equity can not restrain the building of one nor its appropriation to the use intended.

BILL in chancery. The opinion states the facts.

Ewing, for the complainant.

Meigs, for the defendant.

By Court, MCKINNEY, J. This bill was filed to restrain the defendant from proceeding to erect a livery stable in the city of Nashville, upon the ground that such stable would be a nuisance to the neighborhood.

The bill in substance alleges that the complainant is the owner of two valuable brick dwelling-houses fronting on Cherry street, in one of the best neighborhoods in the city of Nashville; that said houses have rented, the one for four hundred and fifty dollars, and the other for four hundred dollars, per annum, to persons of the best class of the population of the city who occupy rented houses. That the defendant, some weeks before the filing of this bill, commenced the erection of a building on a lot adjoining the houses of complainant, to be used as a public livery stable, the walls of which are within one or two feet of the walls of his houses, and fronting on Cherry street on a line with said houses. That the building is far advanced towards completion; and that the defendant does not himself propose to keep said livery stable, but to rent it out to such persons as

usually keep livery stables; and to such persons as will necessarily make a nuisance of it: that a livery stable in such a neighborhood is, from its very nature, a nuisance by reason of the "filth, flies, persons, carriages, and animals" that it will gather about it; that it will diminish the value of the income of his property one half, and change the character of his tenants; that the neighborhood is opposed to the erection, but the defendant, with full knowledge of the character of the neighborhood, and of the strong opposition of complainant and others, has persisted in his purpose; that no formal notice was ever given to the defendant to desist from the erection of said stable; that complainant delayed filing his bill in the hope that he would voluntarily desist; and in order to see clearly, from the character of the building, that it was really designed to be used as a livery stable. The complainant alleges that the erection of said stable will occasion an injury to his property, by the diminution and loss of rents, which will be irreparable; and prays that the defendant may be perpetually enjoined from further proceeding in the erection of said building, and from using the same as a livery stable. An injunction was granted, and on the hearing of the cause before the chancellor, was made perpetual.

Upon well-established principles, we are of opinion that the case stated in the bill does not warrant the interposition of a court of equity, at least until after a trial at law shall have been had, establishing the erection complained of to be a nuisance. After the complainant standing by and suffering the building to be erected, and before it has been applied to the use for which it is designed, so as thereby to ascertain whether or not, in point of fact, it will turn out to be a nuisance, and before any trial at law, we think it would be a strong and wholly unwarranted exercise of jurisdiction to grant a perpetual injunction.

We have been referred to no case in which a stable of any sort, whether public or private, wherever situated, has been held to be *ipso facto* a nuisance. The case of *Dargan v. Waddill*, 9 Ired. L. 244 [49 Am. Dec. 421], was an action on the case for a nuisance, in erecting stables so near the dwelling-house of the plaintiff, as, by the noise, offensive smell, etc., to render the plaintiff's house uncomfortable to live in, and thereby much impair its value. The stable was erected for the use of the defendant's hotel, which was situated on a corner lot of the public square in the town of Wadesborough; and the stable

was on a lot immediately between the lot on which the hotel stood, and the plaintiff's dwelling.

The court, in that case, held the stable to be a nuisance because of the manner in which it was constructed and kept. But it is said by the court, and we think correctly, that stables in a town are not, like certain other erections, necessarily and *prima facie* nuisances; that they may be both harmless and useful; but "if they be so built, so kept, or so used as to destroy the comfort of persons owning or occupying adjoining premises, and impair their value as places of habitation, stables do thereby become nuisances."

It can not be denied that a livery stable in a town, adjacent to buildings occupied as private residences, is, under any circumstances, a matter of some inconvenience and annoyance; and must, more or less, affect the comfort of the occupants, as well as diminish the value of the property, for the purposes of habitation. But this is equally true of various other erections that might be mentioned, which are indispensable, and which do, and of necessity must, exist in all towns.

It is easy to imagine, that various buildings, essentially necessary to comfort and convenience in a town, and which, with proper care in their use, are inoffensive, may, from negligence and inattention in the manner of keeping them, become very great nuisances. So in regard to various trades and occupations, useful and necessary in themselves; which may be so conducted as to render the enjoyment of life, within adjacent houses, uncomfortable or unsafe; by infecting the air with noisome smells, or qualities injurious to health; or by continual disturbing noises; or by exciting the constant and reasonable apprehension of danger; or in other modes necessarily tending to diminish the comfort of life, or to destroy the value of the property.

But it is not every diminution of the income or value of adjoining property, nor every species of injury for which an action on the case might be maintained, that will authorize the interference of a court of equity, by injunction. In regard to private nuisances, the jurisdiction of courts of equity to interfere, by way of injunction, rests upon the ground of preventing irreparable mischief; or of suppressing oppression and interminable litigation, or of preventing multiplicity of suits: 2 Story's Eq., sec. 925. The same author lays it down that it is not every case which will furnish a right of action against a party for a nuisance, which will justify the interference of a court of equity

to redress the injury, or to remove the annoyance. So a mere diminution of the value of property by the nuisance, without irreparable mischief, will not furnish any foundation for equitable relief: *Id.*; *Fishmongers' Co. v. East India Co.*, 1 Dick. 163; *Attorney General v. Nichol*, 16 Ves. 342.

But where the injury is irreparable, as where the loss of health, loss of trade, destruction of the means of subsistence, or permanent ruin to property, may or will ensue from the wrongful act or erection; in every such case courts of equity will interfere, by injunction, to prevent, as well as to remedy, the evil: 2 Story's Eq. Jur., sec. 926, and cases referred to in note 3.

It is to be observed, however, that the jurisdiction of courts of equity, by injunction, in cases of private nuisance, is of comparatively recent growth; and is exercised reluctantly without a trial at law: *Eden on Inj.* 274; *Ripon v. Hobart*, 3 Myl. & K. 169.

The rule is thus stated, *Eden on Inj.* 273: Where the matter complained of is not *ipso facto* a nuisance, but may be so, according to circumstances, it becomes necessary to ascertain those circumstances by verdict; but where it is in itself a nuisance, a court is competent to restrain it without verdict. But it is said, *Id.* 274, that where party has been guilty of great laches and connivance, in suffering another to erect a nuisance, the court have not only refused to interfere against the erection of the nuisance, but have also granted injunctions to restrain actions brought at law for the nuisance.

Lord Brougham says, *Earl of Ripon v. Hobart*, 3 Myl. & K. 169, cited 2 Story's Eq. Jur., sec. 924 a, in note 1: "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief without waiting for the result of a trial. But where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so, then the court will refuse to interfere, until the matter has been tried at law, generally by an action, though in particular cases an issue may be directed for the satisfaction of the court, where an action could not be framed so as to meet the question." See also *Attorney General v. Nichol*, 16 Ves. 338; *Attorney General v. Cleaver*, 18 Id. 211; *Attorney General v. Doughty*, 2 Ves. sen. 453; *Chalk v. Wyatt*, 3 Meriv. 688; *Eden on Inj.* 272-276; 2 Story's Eq. Jur., sec. 923, and authorities referred to in note 2; *Caldwell v. Knott*, 10 Yerg. 209; *Vaughn v. Law*, 1 Humph. 133; *Wall v. Cloud*, 3 Id. 181.

In the case above referred to, *Earl of Ripon v. Hobart*, 8 Myl. & K. 169, the lord chancellor adds, that no instance can be produced of the interposition of courts of equity by injunction, in the case of what he calls eventual or contingent nuisance.

The result of our opinion is, that a livery stable in a town is not necessarily a nuisance in itself; and as it is contingent, and remains to be ascertained from future events, whether or not the erection in question will become a nuisance, we hold that, in the present state of the case, a court of equity has no jurisdiction to restrain by injunction, either the completion of the building or its appropriation to the use intended.

The decree will be reversed, and the bill be dismissed, but without prejudice, and also without costs.

RICHARDS v. MEEKS.

[11 HUMPHREYS, 455.]

POSTING NOTICE ON DEBTOR'S SHOP DOOR IS NOT SUFFICIENT NOTICE to him of execution sale. The notice must be served on him, or be left at his residence in proper hands.

EJECTMENT. The opinion states the facts.

Jones and Hill, for the plaintiff in error.

Rose and Baxter, for the defendant in error.

By Court, **TOTTEN, J.** The action is ejectment for lot number 5, in the town of Lawrenceburg. The plaintiff's title depends upon a judgment, levy, and execution sale, and the validity of this sale is contested by defendant. The execution sale was by the coroner, the sheriff being a party to the execution. It appears that John Stevenson, the debtor, was in actual possession of the lot at the time of the levy and sale, but the officer, Gibson, states that he did not give notice to him, not deeming it necessary, but that he advertised the sale, and put one of the notices on the front door of a shop used by the debtor, on the lot in question; and from the testimony of another witness, it is very probable that the debtor must have seen the notice some time before the sale.

His honor, the circuit judge, instructed the jury that placing said notice on the door was not *per se* sufficient; but that if it were read to or by the defendant in the execution, or he knew its contents more than twenty days before the sale, that would be equivalent to written notice, and a compliance with the statute.

In this we think there is error. The act of 1799, chapter 14, provides, that "where the defendant is in actual possession and occupation of the land so executed, it shall be the duty of the sheriff or coroner levying such execution to serve the defendant with written notice," etc.

The case of *Noe v. Purchapile*, 5 Yerg. 216, proceeds upon the principle of an express waiver of the right to notice. In *Carney v. Carney*, 10 Id. 491 [31 Am. Dec. 590], the debtor, upon whom no notice had been served, was present at the sale and aware that it was then going on, and made no objection; yet it was held that this was not a waiver of the right to notice.

The debtor was entitled to a written notice of the time and place of sale, to be served by the officer having charge of the execution, and no valid sale could be made without it, unless he expressly waived his right. It is not a compliance with the statute, nor a safe construction of it, to hold that if the debtor have twenty or more days' notice of the time and place of sale by other certain means, that that shall be equivalent to a service of the written notice required by the statute. The notice must be served on him, or if he be absent, so that it can not be actually served, it must be left for him, in proper hands, at his residence so that he may get it. If the notice be not that which is required by the statute, and it were held that other notice, deemed equivalent, might be sufficient, it would become a most difficult and uncertain question to determine what other notice, in a great variety of cases, would be equivalent to that required by the statute. And hence, titles dependent upon the validity of the notice would become uncertain, and the property be often sacrificed at the sale, because of the uncertainty of the title. The right conferred upon the debtor by the statute should not be taken away by construction; and the duty it imposes on the officer is plain and simple, and can better be performed in the manner required by the statute than in any other manner which he might suppose to be equivalent.

In this view of the case, it is not deemed material to notice any other question made upon the record.

Judgment reversed, and cause remanded

STATUTE AS TO NOTICE MUST BE STRICTLY PURSUED, and if it is required that notice be given and proved in a particular way, that way must be followed: *Newby v. Perkins*, 25 Am. Dec. 160. The principal case is cited to the point decided in the case in *Hinson v. Hinson*, 5 Sneed, 324.

WOMACK v. SMITH & TINSLEY.

[11 HUMPHREYS, 473.]

POWER OF EQUITY TO DECREE DELIVERY OF CHATTELS is limited to chattels having special or peculiar value, or where damages would be inadequate. **UNDER BEQUEST TO CLASS, SUBJECT TO INCREASE OR DIMINUTION** by reason of future births or deaths, the entire interest vests in such persons only as fall within the class at the date of distribution.

THE opinion states the facts.

Fogg and Fife, for the complainant.

Hart and Cullom, and Baldrige and Head, for the defendants.

By Court, **TOTTEN, J.** By the will of William Lindsey, certain legacies were given in trust for the use of his son, Thomas Lindsey, and his wife, and the survivor of them, during the life of the survivor, and at the death of said tenants for life, the said legacies are given to their lawful children, or in case of their death, or the death of any of them, "to their lawful offspring." If the wife of Thomas Lindsey should survive him, and again marry, that fact was to terminate her interest in the legacies. The plaintiff became the trustee, and took possession of the money fund. These transactions occurred in Prince Edward county, Virginia, where the parties resided. On the seventeenth of June, 1844, an order of court was there made, that the trustee should invest said funds in the purchase of a negro woman for the use of said beneficiaries, taking the title to himself, in trust, for their use.

After this, the plaintiff placed in possession of Thomas Lindsey, a negro woman, Emma, and her two children, Maria and Charlton, of the value of six hundred dollars; being a greater sum than the amount of the trust fund; but with the understanding that said Lindsey's family should have the use of these slaves, and in case of an addition to the trust fund, which was expected, they were to be conveyed, in trust, for the use of the family. No absolute sale or any conveyance was ever made. In November, 1845, the plaintiff caused said slaves to be taken out of the possession of said Thomas Lindsey, being apprehensive that he was about to remove them; but his assent, on receiving strong assurances to the contrary, restored the slaves back to the possession of said Thomas Lindsey, who immediately afterwards, and in the night, ran off with the slaves, and came with them to Smith county, Tennessee, except the slave Maria, who, it seems, he sold on the way. Thomas Lindsey died in 1846, in the county of Smith, and his wife administered

on his estate. The administrator procured an order of court to sell the slave, Emma, and her infant child, Archer, and they were sold at public auction to defendant Smith, on the sixteenth of January, 1847, for four hundred and fifteen dollars, which went to the assets of the estate. On the twenty-ninth of June, 1847, said Susanah Lindsey and her son Granville Lindsey, and her son-in-law Walker Hooker, sold to defendant Tinsley the other slave, Charlton, for two hundred and ten dollars, and covenanted with him to perfect his title, by procuring the conveyance of the other children interested in the slaves, as recited in the covenant, as they should arrive at age.

This suit was instituted by the plaintiff, to recover the possession of said slaves, on the thirteenth of February, 1847. The defendants have filed cross-bills, in which they pray, that in case they have no title to said slaves, the trust fund in plaintiff's hands be decreed to them for indemnity, to the extent of the interest of those children of said Thomas Lindsey, who are of age, and who, it is said, concurred in said sales; three of said children are yet minors. The chancellor dismissed the plaintiff's bill, and he has appealed in error to this court.

The defendants' counsel object to the jurisdiction of the court of chancery in the present case, upon two grounds: 1. As a sale of the slaves was intended, the plaintiff is not entitled to the peculiar relief given by that court, but that a compensation in damages should be considered an adequate remedy; and, 2. If that were not so, yet the action of replevin, under the provisions of the act of 1846, chapter 65, now affords an adequate and efficient remedy at law, to restore the slaves back to the possession of the plaintiff.

The remedial power of a court of equity to decree the delivery of specific chattels, is limited to a class of cases where the chattel has a special and peculiar value, and where the remedy at law, in damages, would be entirely inadequate; as, where the chattel is a family relic, or ornament, or heirloom, or other thing of kindred nature. This is an original and well-settled jurisdiction of the court, in which its remedial justice is administered by the process of injunction, ordering a specific delivery of the chattel to the rightful owner: 2 Story's Eq. Jur., sec. 708.

Now, this principle has been applied to slaves as a property of special and peculiar value, for the recovery of which, the owner is entitled to this higher and more perfect remedy, as a compensation in damages would be utterly inadequate and un-

satisfactory to the rightful owner. It is, however, a well-settled rule, that to entitle the party to this special relief, his title to the slave or other chattel, where the principle applies, must not be doubtful, but clear and indisputable.

It was intimated in some of the early cases, that the principle did not apply to slaves generally, but applied only where it appeared that they were of special value to the owner, as family servants, for which he had special regard; and, therefore, in the pleadings, we frequently see averments to this effect. This modification of the principle would seem to require that the owner of the slave should aver and prove a case of special value, to entitle himself to this special and peculiar remedy. Such, however, has never been the practice; but, assuming that slaves are of special and peculiar value to the owner, the jurisdiction is made to depend upon the relation of master and slave, and the clear and unquestionable character of the plaintiff's title: *Henderson v. Vault and Wife*, 10 Yerg. 37; *Loftin v. Espy*, 4 Id. 91; *Saunders v. Woods*, 5 Id. 142; *Bryan v. Earthman*, 6 Id. 25; *Prewet v. Loony*, 8 Id. 66.

Now, the plaintiff has shown a clear and valid title to the slaves, and Thomas Lindsey, under whom defendants claim, was a mere bailee of the slaves, without any title or color of title. As to the remedy at law, it is true that the action of replevin is now, in most cases, an adequate and efficient remedy to restore the possession of the slave to the rightful owner; but it is equally true that this remedy at law, given by statute, does not take away the original and independent jurisdiction of the courts of equity on the same subject, which they had before rightfully exercised. "The jurisdiction of equity," says Mr. Story, "like that of law, must be of a permanent and fixed character. There can be no ebb and flow of jurisdiction, dependent upon external changes. Being once vested legitimately in the court, it must remain there, until the legislature shall abolish or limit it; for, without some positive act, the just inference is, that the legislative pleasure is, that the jurisdiction shall remain upon the old foundation:" 1 Story's Eq. Jur., sec. 64 i.

We therefore conclude that no valid objection, upon either ground, can be taken to the jurisdiction of the court; and proceed to the consideration of the other defense relied upon by counsel.

The defendants insist that they are purchasers *bona fide* without notice of the plaintiff's title. They claim under the assumed title of Thomas Lindsey, and we have seen that he was not only

without any valid title, but without color or semblance of title. Both the legal and equitable title were in the plaintiff, and we have seen that the slaves were fraudulently and secretly removed from Virginia to Tennessee, where the defendants purchased without any connivance or negligence on the part of the plaintiff. Thomas Lindsey must be considered as a mere bailee of the slaves, without any authority to remove them from Prince Edward county, Virginia; but, on the contrary, under express injunctions not to remove them. It is this circumstance alone that mitigates his act from felony to fraud. Now, the defendants say that they had no notice of this transaction, or of the plaintiff's title, and that they purchased and paid the money in full confidence that the title of said Thomas Lindsey was good and valid. We do not deem it material to raise any question of diligence against the defendants; but to say the least of it, the plaintiff has been equally diligent and equally innocent as they; and having the legal title and equal equity, is unquestionably entitled to a recovery.

The purchasers must hold a legal title, or the right to demand it, in order to give them the full protection of the defense relied upon; for if their title be merely equitable, they must yield it to the superior legal and equitable title of the plaintiff: Story's Eq. Jur., sec. 64 c, and sec. 1502. In the last place, the defendants insist that as the purchase money for said slave went to the payment of the debts, and to the use of the family of said Thomas Lindsey, the defendants are entitled in equity and conscience to be refunded out of the trust funds of said beneficiaries in the hands of the plaintiff as their trustee; and if not to the entire amount, at least to the extent of the interest of such of said beneficiaries as were of age, and concurred in the fraudulent sale of slaves to which they had no title. To effect this object, the defendants have filed their cross-bills in this suit.

However much inclined to take this view of the case, so consonant to reason and justice, yet, upon legal principles, we are constrained to take a different view of the subject.

In *Satterfield v. Mayes*, 11 Humph. 58, at Knoxville, 1850, a will contained the following clause: "I lend to my daughter, Betty Mayes, one negro girl, named Lettice, during her natural life, and after her death, she and her increase to be equally divided between her daughters."

Upon the construction of this clause, McKinney, J., delivering the opinion of the court, said: "The rule is well settled, that where a bequest is made to a class of persons, subject to

fluctuation by increase or diminution of its number, in consequence of future births or deaths, and the time of payment or distribution of the fund is fixed at a subsequent period, or on the happening of a future event, the entire interest vests in such persons only as at that time fall within the description of persons or constitute such class." And reference is made to 1 Jarm. on Wills, 295; 1 Roper on Legacies, 71, etc.

Now, it will be seen that the present case falls precisely within this principle. At the death of Thomas Lindsey and his wife, or if the wife survive, then at her second marriage, if that event should occur, the fund is to be equally divided amongst their children. The legacy in remainder is to a class, and those living when it shall vest in possession, will be entitled to receive it to the exclusion of the representatives of any that may have previously died without issue, because it will be seen that by the terms of the legacy, such issue as may then be living will be entitled to an interest in the fund, not in their representative character, but in their own right, as legatees under the will. It follows, therefore, that the children now of age have no present interest in the fund of a fixed and permanent character, and which could be affected by decree; because in case of the death of any of them, before the remainder shall vest in possession, their interest would go to the survivors.

The decree of the chancellor will be reversed, the cross-bill dismissed, and decree made for the plaintiff, ordering the slaves to be delivered, etc.

BEQUEST OR DEVISE TO CLASS means those living at the testator's death: See *Collin v. Collin*, 45 Am. Dec. 420, and note 423; and *Bridgewater v. Gordon*, 2 Sneed, 9; *Whitman v. Young*, 1 Tenn. Ch. 587, citing the principal case.

RECOVERY OF SPECIFIC CHATTELS.—The principal case is cited to the point that where the plaintiff had a clear title to chattels in another's possession, she had a right to file a bill to recover the possession of them, in *Lee v. Cone et al.*, 4 Coldw. 395.

ALLEN, ADM'R, v. THOMASON.

[11 HUMPHREYS, 536.]

DOMICILE OF INFANT IS PLACE OF HIS BIRTH, if it were at the time the domicile of his parents.

INFANT CAN NOT ACQUIRE NEW DOMICILE BY HIS OWN ACT.

INFANT'S DOMICILE FOLLOWS DOMICILE OF HIS PARENTS.

INFANT'S DOMICILE CAN NOT BE CHANGED BY MOTHER AND STEP-FATHER removing to another state and taking the infant with them.

REMOVAL OF INFANT WITH INTENT TO RETURN does not change his domicile.

DOMICILE OF INFANT WHILE TRAVELING, or temporarily away from his birthplace, is still his birthplace.

INTERPLEADER. The opinion states the facts.

J. R. Hawkins, for the complainant.

L. M. Jones, for the defendant.

By Court, **TOTTEN, J.** The case is a bill in the nature of an interpleader, brought by the administrator of Sandel Britt, deceased, against the several persons claiming adverse and conflicting rights, as distributees of her estate; and the prayer is, that said persons interplead, and that their conflicting claims be considered and determined.

The material facts are these: Several years since, James J. Britt died in Carroll, in this state, the place of his domicile, leaving his wife, Winny, and several children, that is to say, Sandel Britt, James J. Britt, and others, surviving him. For these children a guardian was appointed in the county of Carroll. Thereafter, Winny, the widow, intermarried with Alfred B. Thomason, and the said Winny has three children by this second marriage. Thomason removed from Carroll to the state of Arkansas, taking with him his family and the children of his wife by her former marriage. Becoming dissatisfied with his residence in Arkansas, Thomason determined to remove back to his former residence in Tennessee. With this intent, he, with his family, including Sandel Britt, who had been residing with him, left the state of Arkansas, and on the way, at Tunica, in the state of Mississippi, about February, 1846, Sandel Britt died, a minor, intestate and unmarried. Thomason then continued his journey, stating at the time that he was on his return from Arkansas to Tennessee. When he came to De Soto, he remained or resided there for two years, and then finally removed to his former residence in Tennessee. The personal property of Sandel, derived from her father's estate, remained in possession of her guardian, in Carroll, until it was delivered by him into the possession of the plaintiff, who administered in Carroll.

The principal question is, whether the succession to the estate of said Sandel shall be governed by the laws of Tennessee or Mississippi? It is insisted that by the removal to Arkansas the intestate lost her original domicile in Tennessee, and by the removal from Arkansas lost her newly acquired domicile there;

and having died in the state of Mississippi, where her surviving parent remained for two years before the original domicile in Tennessee was resumed, the place of her death should be considered her domicile, and the law of that place govern the succession.

We may observe that by domicile two things are implied: the residence of the person, and the intention to make it his home. A minor, not being *sui juris*, has no power or capacity to acquire a new domicile by any act or purpose of his own; his domicile is the place of his birth, if it were at the time the domicile of his parents. If the parents change their domicile, that of the minor necessarily follows it, he being under their will and control, and without any power to choose a domicile for himself. But in the present case, the father being dead, the minor was removed from her native domicile by her mother, who, by reason of her second marriage, was herself subject to the will and dominion of another, and acquired a new domicile of his selection. The removal was not by the will and act of the mother, but of her husband, who, from anything arising in his relation to the minor, had no power or authority to remove the minor or to change her domicile. The guardian in Carroll was entitled to the possession of the minor, as his ward, so as to enable him to provide for her protection, maintenance, and education. It follows, therefore, that as the minor had no power to abandon her domicile of nativity and acquire a domicile of choice, and as her removal was by the act of a person who had no rightful authority over her, the original domicile of the minor was not changed by the removal; she did not acquire a new domicile in Arkansas, or lose her domicile of nativity in Tennessee.

If, however, it were conceded that a change of domicile had been effected, yet the removal of the family from Arkansas, with the evident intent to return to their former residence, would be conclusive in favor of the domicile in Tennessee. For it seems to be a well-settled rule, that "if a man has acquired a new domicile, different from that of his birth, and he removes from it, with an intention to resume his native domicile, the latter is reacquired, even while he is on his way, *in itinere*, for it reverts from the moment the other is given up:" Story's Conf. L., sec. 47.

If this were not so, the person would be, for the time, while *in itinere*, without any domicile, which would be highly inconvenient; for in case of his death, by what law should the succession to his estate be determined?

At the time the family removed from Arkansas there was no intention to establish their residence in Mississippi, nor was there any such intention at the time of the intestate's death. The declarations of Thomason made at the time are competent evidence, and when taken in connection with his actual movements, on which circumstance their competency depends, they are perfectly conclusive of his intention to resume his original residence in Tennessee. His subsequent residence in Mississippi and temporary change of purpose can not affect the question, as the case must turn upon the state of facts existing at the time of the intestate's death.

We are therefore of opinion that at the time of her death the intestate had her legal domicile in Tennessee, by whose laws the succession to the personal estate, wherever it may be, will of course be governed: 2 Kent's Com., lec. 37.

In the present case, the persons entitled to the succession are the mother and brothers and sisters of the intestate, both of the whole and half-blood, all of whom have an equal interest in the personal estate: Act 1766, c. 3, sec. 1; 1796, c. 14, sec. 1; 2 Kent's Com., lec. 37.

The view we have taken of the case being in accordance with that of the chancellor, his decree will, in all things, be affirmed.

DOMICILE OF MINOR CHILD IS AT DOMICILE OF ITS PARENTS during their life-time, and should the mother survive the father, the child's domicile follows that of the mother during widowhood: *School Directors v. James*, 37 Am. Dec. 525; and see *Overseers of Alexandria v. Overseers of Bethlehem*, 31 Id. 229. A minor child can not, in general, while under age, *proprio Marte*, change its domicile; nor has a guardian unlimited power to effect such change: *Hiestand v. Kuns*, 46 Id. 481, and note; *White v. White*, 3 Head, 410; *Williams v. Saunders*, 5 Coldw. 80, citing the principal case.

THE STATE v. COLVIN.

[11 HUMPHREYS, 509.]

THAT FORMER CONVICTION WAS PROCURED BY FRAUD of defendant before a justice of the peace under the small-offense law, is a good replication to a plea of former conviction.

THAT FORMER CONVICTION WAS PROCURED WITHOUT JUSTICE HEARING EVIDENCE, is a good replication to a plea of former conviction.

INDICTMENT for an affray. The opinion states the facts.

Attorney general, for the state.

Cocke, for the defendant.

By Court, McKINNEY, J. The defendant and one David H. Evans were jointly presented in the circuit court of Grainger, at the December term, 1849, for an affray.

To this presentment the defendant, Colvin, pleaded a former conviction before William Colvin, a justice of the peace of said county of Grainger. The plea in substance alleges, that on the twenty-second of December, 1849, one William Colvin, a justice of the peace in and for said county, issued his warrant for the apprehension of said defendant, which warrant is set forth in the plea, and that by virtue of said warrant he was duly arrested and brought before the said William Colvin, justice as aforesaid, to answer said charge exhibited against him in said warrant for an affray; and that he then and there did submit and confess himself guilty of said affray as charged in said warrant. And thereupon said justice, after having duly sworn and examined the witnesses in the case, assessed a fine of two dollars against the defendant for said offense, together with the costs, which judgment for fine and costs the defendant paid and satisfied, and was thereupon discharged.

To this plea the attorney general replied. The material allegations of the replication are, that the defendant was not arrested and brought before a justice to answer said charge contained in said presentment: but that in fraud of the law, and by collusion, he procured a warrant to be issued "by his kinsman," said William Colvin, and acknowledged service of said warrant; and that said Justice Colvin did not hear the evidence, and fined said defendant according to the aggregation of his offense.

To the foregoing replication the defendant demurred; and on argument the demurrer was sustained, and the defendant discharged. The attorney general appealed in error to this court.

The only question for our determination is, whether the replication presents sufficient matter in avoidance of the plea, and we think it does. The brief experience we have had of the practical operation of the act of 1848, chapter 55, "for the punishment of small offenses," sufficiently demonstrates that however salutary its provisions, if carried into effect according to their true intent and meaning, it is a law nevertheless liable to be, and has been not unfrequently, very grossly abused.

While the statute was designed to furnish a more easy, expeditious, and less expensive mode for the punishment of ordinary misdemeanors, it was certainly never intended by its authors to abate, in the slightest degree, the rigor of the principles of

criminal jurisprudence applicable to such cases, nor to impair the efficiency of their administration, much less to open a door to fraudulent and collusive evasions of the law. To make a conviction under this statute a bar to a prosecution in the circuit court, it must appear that the case was properly within the authority and jurisdiction conferred upon the justice; that the proceedings were fairly and legally conducted, and that all the material requirements of the statute were complied with, not colorably or collusively, but substantially and in good faith.

The offender can not voluntarily appear before the justice and charge himself. And therefore it was held in *The State v. Atkinson*, 9 Humph. 677, that the plea of the defendant in that case was bad for want of the averment that he had been brought before the justice by process regularly issued against him. Neither can he be permitted, by his own procurement, or by collusion with others, to have himself brought before the justice, even under color of legal process. To tolerate this would be mere mockery of the administration of the law. It has also been held, in the case of *The State v. Spencer*, 10 Id. 431, that to constitute a good plea it must be distinctly averred that the justice heard the evidence as required by the statute.

The replication in this case substantially alleges that the proceedings before the justice were fraudulent and collusive, and were instituted by the procurement of the defendant. It further alleges that the justice did not hear the evidence in the case. And we hold that if both or either of these allegations shall be sustained by the proof, the proceedings before the justice will be treated as a nullity, and, of course, as no bar to this indictment.

The judgment will be reversed, the demurrer overruled, and case be remanded.

CONVICTION BEFORE JUSTICE OF PEACE, AND PERFORMANCE OF SENTENCE imposed, constitute a bar to an indictment for the same offense, although the judgment was so defective that it would have been reversed on error: *Commonwealth v. Loud*, 37 Am. Dec. 139. The principal case is cited to the point decided in it, in *State v. Clenny*, 1 Head, 272; *Fulkner v. State*, 3 Heisk. 35; *Mikels v. State*, Id. 326.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

FELTON v. DEALL.

[22 VERMONT, 170.]

WHERE OWNER OF FARM AND FERRY LEASES THEM BY PAROL for a year, the lessee agreeing to pay as rent one half of the profits and proceeds of the farm, and one half of the receipts of the ferry, such lessee is the tenant, not the servant, of the owner, and the latter is not liable to an action for injuries caused to a third person by such tenant's negligence in the management of the ferry.

CLAUSE IN LEASE OF FARM AND FERRY MAKING LESSEE LIABLE to the lessor "for all damage occasioned by willful misconduct or neglect in the management of the farm and premises, and in the management of the ferry and boat," applies only to such damages as might result to the lessor's reversionary interest from the misconduct or neglect of the lessee, but does not render the lessor liable for injuries done by the lessee to third persons.

CASE for so negligently managing a ferry-boat that the person and property of the plaintiff suffered injury. The facts are stated in the opinion.

H. Hale and C. D. Kasson, for the plaintiff.

E. J. Phelps, for the defendant.

By Court, KELLOGG, J. This was an action upon the case, charging the defendant with an injury occasioned to the plaintiff by the negligence of the defendant's servant. Upon the facts disclosed in the case, the court below instructed the jury, that the defendant was not personally liable for the injury done to the plaintiff. This decision being excepted to, the case is brought here for the opinion of this court. The defense relied upon is, that at the time of the injury, of which the plaintiff complains,

the ferryman, whose negligence occasioned the injury, was not the servant of the defendant, and that she was in no manner accountable. The decision of the question depended upon the construction given to an instrument executed by the defendant to one Bailey, and referred to in the bill of exceptions. It was therefore a proper subject for the determination of the court.

That the defendant, in March, 1848, leased her farm and ferry, by parol agreement, to Hobbie, for one year, upon the terms and stipulations contained in her written lease to Bailey, is not controverted, and that Hobbie then went into the occupancy of the demised premises under the lease, is not denied. Nor is it questioned, that if the contract of letting by the defendant to Hobbie was such as to divest the defendant of the occupancy and control of the farm and ferry, and vest the same in Hobbie for the term of the demise, the defendant would not be liable for injuries occasioned by the negligence of Hobbie. In other words, if, by the contract, Hobbie became the tenant, rather than the servant, of the defendant, she is not responsible for his acts.

But it is urged, that the contract with Bailey was not a lease of the premises. It is difficult to perceive any tenable ground upon which this objection is founded. The instrument certainly contains the usual covenants and all the ordinary characteristics of a lease. It is, however, contended, that though the instrument be regarded as a lease, yet that it did not divest the defendant of the control of the premises. This objection, we think, is equally unfounded. There is no reservation of a right to the defendant to interfere with or in any manner control the lessee in the management of the premises. The lease does, indeed, bind the lessee to a very strict and faithful performance of the stipulations therein; but upon his failure to perform the same, the lessor's only remedy would be by suit for a breach of the covenants. It is the ordinary case of a lease of premises, to be managed and controlled by the lessee during the continuance of the lease; and the lessor, during the term, had no more authority than a stranger, to disturb the lessee in his occupancy, or in any manner interfere with his rights to the management and control of the premises. It can not, therefore, as it appears to us, be said that the defendant, at the time of the injury complained of, had any control over of the acts of Hobbie; and if she had no right to control him, she can not be made responsible for his acts.

It is further insisted, that the clause in the lease, securing to

the defendant a moiety of the earnings of the boat, created such an interest in the defendant in the profits of the ferry, as makes her responsible for the negligence of Hobbie in the management of the same. We can not, however, yield our assent to this proposition. There is nothing in the lease to warrant such a conclusion. The object of this clause is simply to fix the amount of rent to be paid for the use of the ferry, and the same is to be ascertained by the amount of the receipts. And the fact that the rent of the ferry is to be paid by weekly installments, does not change or vary the legal character and effect of the lease. There is no pretense for saying that the defendant and her lessee, Hobbie, are partners in the matter of the ferry. She has no authority to appoint or employ ferrymen, or to control them when employed by Hobbie.

It is further urged, that the clause in the lease, making the lessee liable to the defendant "for all damage occasioned by willful misconduct or neglect, in the management of the farm and premises, and in the management of the ferry and boat," subjects her to the present suit. We do not think, however, that this part of the lease is open to such a construction, or that the parties to it ever contemplated such a liability. The liability imposed upon Hobbie by this clause applies as well to the farm as to the ferry, and we think it only applies to such damages as should result to the reversionary interest of the defendant from the misconduct or neglect of the lessee. Should the ferry be rendered less valuable to the defendant by reason of misconduct or neglect of the lessee, it would doubtless be a breach of this covenant, for which he would be liable. So if by his misconduct the boats should be injured, he would be responsible to the defendant. In fact, any injury to the demised premises, injuriously affecting the reversion and occasioned by the misconduct of the lessee, would render him liable to the defendant; but we do not think it was ever intended by the parties to embrace injuries done by the lessee to third persons, and for which the law in no manner makes the defendant responsible.

The judgment of the county court is affirmed.

LIABILITY OF LESSOR FOR INJURIES CAUSED BY FAILURE TO REPAIR: See *City of Lowell v. Spaulding*, 50 Am. Dec. 775, note 776, where this subject is discussed at length.

THE PRINCIPAL CASE IS CITED IN *Joy v. Jackson & M. P. R. Co.*, 11 Mich. 166.

GRIFFITH & Co. v. BUFFUM ET AL.

[22 VERMONT, 181.]

WHERE ONE PARTNER PURCHASES GOODS ON HIS SINGLE CREDIT for the use of the partnership, if the seller does not know at the time of the existence of the partnership, he may, when he discovers it, hold the firm liable.

WHERE TWO PERSONS HAVE COMMON INTEREST IN PROFIT AND LOSS of the business carried on by them, they are partners as between themselves.

BOOK-ACCOUNT. Judgment to account was rendered in the county court, and an auditor was appointed to report the facts. Judgment was rendered for the defendants upon the report. The facts appear from the opinion.

Cook, Harrington, and Roes, for the plaintiffs.

D. E. Nicholson, for the defendants.

By Court, HALL, J. The question for our decision is, whether, upon the facts reported by the auditor, the defendants are properly chargeable with the marble slabs sold and delivered by the plaintiffs to the defendant Buffum.

There seems to be no doubt that if one partner purchase property upon his single credit, for the use of the partnership concern, and the seller is not aware of the existence of the partnership, he may, when he discovers it, have the benefit of the partnership liability. The ground of making the partnership firm liable is, that the property having been obtained for their joint benefit and to enable them to make a common profit, it is but just that they should be jointly liable to pay for it.

It is doubtless essential to the validity of such a claim by the vendor that the partnership should have been unknown to him at the time of the sale; for if he were aware of the partnership, or ignorant of it through his own fault, he would be presumed to have made his election to give credit to the individual instead of the firm, and having made such election, would be bound by it: 3 Steph. N. P. 2402.

It is not claimed on the part of the defendants that the plaintiffs had any knowledge that they were partners. The existence of such partnership is denied, and the question is, whether the defendants were in fact partners.

It is true, that two or more persons may be made liable to third persons as partners, when, as between themselves, they are really not so. But such liability only arises when third persons have trusted to their credit—have parted with their property upon the faith of the acts or declarations of the supposed

partners, indicating that they were such. In this case the plaintiffs were not deceived by any false appearances; they gave no credit to the firm, but trusted Buffum only; and if Ainsworth is to be made liable, it can only be because he was really and truly a partner with Buffum.

In order to constitute a partnership between the parties themselves, it is necessary that they should have a common interest in the profit and loss of the business in which they are engaged. It is not essential that each should furnish a share of the capital or property which is to become the stock or subject-matter of the business of the partners. One may furnish the capital or stock, and another contribute his labor and skill. And if it be agreed between the parties that one shall furnish on his own account a particular kind of stock to be used in the business, yet if, when purchased, it becomes the subject of labor and skill, and in its altered state is to be sold for the common benefit, it constitutes a partnership business; and if such particular kind of stock be purchased on his own account by the party who is by the agreement to furnish it, yet the seller, on discovering the partnership, may make the firm chargeable for it. This position is sustained by many authorities referred to in the argument: 3 Kent's Com. 26; *Sylvester v. Smith*, 9 Mass. 119; *Everitt v. Chapman*, 6 Conn. 347.

In the present case the parties agreed to work together in the business of manufacturing marble. Buffum was to furnish the marble and Ainsworth to pay him one half of the cost of it. Buffum was to board Ainsworth, and both were to contribute their labor and skill in the business; and the products and avails of the business were to be equally divided between them. We think the parties became strictly partners as between themselves. Whatever the manufactured articles should sell for, above the cost of the materials and labor bestowed upon them, would be profits, which the parties were to share in common; and if the sale should be for less than such cost, the parties would suffer a loss, which would fall equally on both. The defendants thus having a common interest in the profit and loss of the business, and the marble charged in the plaintiff's account having been used by the defendants in such business, we think they are liable for it as partners.

The judgment of the county court is therefore reversed, and judgment is to be rendered for the plaintiffs for the amount of their account, as reported by the auditor.

PARTNERSHIP, WHAT CONSTITUTES, IN GENERAL: See *Bartlett & Co. v. Jones*, 49 Am. Dec. 606, note 608, where other cases are collected.

GOODS PURCHASED BY ONE PARTNER IN HIS OWN NAME, and upon his own credit, although used in the business, are not liable to be seized for a private debt of the other partner, contracted in his own name, and entirely disconnected with the business: See *Allen v. Dunn*, 33 Am. Dec. 614.

PARTNERSHIP ASSETS, WHEN APPLIED TO DEBT OF INDIVIDUAL PARTNER: See note to *Allen v. Dunn*, 33 Am. Dec. 617, where other cases are collected.

WARREN v. EDGERTON.

[22 VERMONT, 199.]

EACH DEBTOR IN EXECUTION IS LIABLE FOR WHOLE DEBT IN SOLIDO, and the officer levying the execution is not bound to regard any equities subsisting between the debtors themselves, or between the debtors and their other creditors.

OFFICER ABOUT TO LEVY EXECUTION UPON LAND OF ONE OF SEVERAL DEBTORS in execution, is not bound to regard such debtor's offer to expose to him the personal property of his co-debtors and to indemnify him for levying the execution upon such personal property.

WHERE OFFICER HAVING EXECUTION AGAINST SEVERAL DEBTORS LEVIES IT UPON LAND of one of them, although such debtor offered to expose to him the personal property of his co-debtors, the debtor whose land is so levied upon can not maintain an action against the officer for levying upon the land, or for falsely returning that the execution debtors had neglected to expose personal property sufficient to satisfy the execution.

TRESPASS on the case. The first count of the declaration alleged that plaintiff had purchased of one Buck certain land, which was at the time under attachment in a suit against Buck, Rand, and Hendee; that judgment was subsequently rendered in that suit against all the defendants, and execution issued thereon, which was placed in the hands of the defendant, who was then sheriff, to be executed; that although Buck pointed out and tendered to the defendant sufficient personal property of Buck, Rand, and Hendee to satisfy the execution, yet the defendant wrongfully levied the execution upon the land above mentioned; and that the plaintiff, to redeem the land, was compelled to pay the full amount due on the execution, with the officer's fees for the levy. In the second count it was alleged that the defendant had falsely returned upon the execution that the debtors had not exposed or tendered personal estate sufficient to satisfy the execution and the legal charges. The evidence showed that when the execution was levied the defendant called on all the defendants and demanded payment of the amount due; that Buck told him he should turn out the personal property of Rand and

Hendee, and tender and expose personal property belonging to them, but the defendant refused to take the personal property of Rand or Hendee, but offered to take any personal property of Buck's own that he would expose to him; that subsequently the plaintiff and Buck offered to fully indemnify the defendant for taking the personal property of Rand and Hendee, but he refused to take it, and proceeded to levy on the premises in question. The return of the defendant was substantially as alleged in the second count of the declaration.

E. N. Briggs and C. L. Williams, for the plaintiff.

E. Edgerton, for the defendant.

By Court, REDFIELD, J. We think each debtor in execution is to be regarded as liable for the whole debt, *in solido*; and the officer having the execution to levy is not bound to regard any equities subsisting between the debtors themselves, or between the debtors and their other creditors. Whether there be any mode in which such equities can be reached is not necessary now to be determined.

It is obvious to us, that to hold that one execution debtor might turn out the personal property of his co-debtor, and might, upon giving indemnity, require the officer to levy the entire amount of the execution upon such property, while other debtors might, with the same pertinacity, be pressing counter-commands upon the officer, would lead to inextricable embarrassment, if the officer were disposed to perform his duty, and would, in every way, be liable to the greatest abuses.

Judgment affirmed.

DEFENDANT IN EXECUTION CAN NOT SUSTAIN ACTION against a marshal or sheriff for failure to levy the writ on the property of a co-defendant, although as between the co-defendants the latter was principal and the former surety: *Gregg v. Crawford*, 37 Am. Dec. 739.

ROBINSON v. CONE.

[22 VERMONT, 213.]

PLAINTIFF, TO SUSTAIN ACTION FOR INJURY CAUSED BY NEGLIGENCE OF DEFENDANT, must show that the injury did not occur to him, in whole or in part, from any want of ordinary care on his own part. All that the law requires of him is care and prudence equal to his capacity.

THOUGH CHILD OF TENDER YEARS MAY BE IN HIGHWAY FROM FAULT or negligence of his parents, and so be improperly there, yet if he is hurt by the negligence of the defendant he is not precluded from his redress.

ONE KNOWING THAT CHILD OF TENDER YEARS IS IN HIGHWAY is bound to a proportionate degree of watchfulness, and what would be but ordinary neglect in regard to one whom he supposed to be a person of full age and capacity would be gross neglect as to a child, or one known to be incapable of escaping danger. In the case of a child four years old, he is bound to the utmost circumspection.

TRESPASS for an assault and battery. Plea, the general issue. On the trial the plaintiff gave evidence tending to prove that at the time of the injury complained of he was about three years and nine months old; that his father resided at the summit of a hill about a quarter of a mile from the school-house at which the plaintiff was at the time attending school; that in going to and returning from school he necessarily passed along the public highway leading down the hill; that on the day the injury occurred, about one o'clock in the afternoon, he was sliding down the hill, in the traveled part of the highway, very near the west side, on a small sled, lying on his breast, with his legs projecting behind the sled; that while he was so situated the defendant came upon the brow of the hill with a load of bark on a traverse-sleigh drawn by two horses; that he came down the hill, on the west side of the road, at a sharp trot; that plaintiff was then two or three feet from the west side of the road, where a bank rose abruptly; that the traveled part of the road at that point was something over twenty-two feet wide; that while plaintiff was in the position described, his left leg was caught by the right runner of the rear traverse of the defendant's sleigh, and so broken and lacerated as to require amputation; that his shoulder was also dislocated, and that he received other injuries. The plaintiff further gave evidence tending to prove that the length of the road on the hill was four hundred and ten feet, and its ascent in that distance about four hundred and thirty-three inches; that the whole surface of the road where the accident took place was smooth from use. The plaintiff also proved that the defendant said, after the injury, that when he came over the brow of the hill he saw something in the road which he supposed to be a dog; that when he saw it was a boy he thought he would have wit enough to get out of the way; that his horses were well broken, and he held them hard, so that they did not raise their feet from the ground, but they could not stop the load suddenly; that when he saw that the horses could not hold the load he turned them to the east side of the road, and the horses and the forward traverse of the sleigh passed by the boy without touching him, but the rear traverse did not track after the forward one, and ran over him; that the

hill was always swarming with children, and he never drove into the village without finding the hill alive with them. The plaintiff's evidence tended to prove that the place where the defendant was when he first saw the plaintiff was distant from the plaintiff about ten rods. The evidence given by the defendant tended to prove that the road upon the hill was narrow, and very slippery from the travel on it and from its use by the boys for sliding; that the surface was undulating; and that he was on a steep point of the hill when he discovered the boy, trotting slowly, and driving at the usual and ordinary rate of speed at which prudent men drive with such a load at such a place. The court charged the jury that the defendant in this case would not be liable if the injury to the plaintiff happened while the defendant was in the exercise of ordinary care and prudence; that if the defendant were not in the exercise of ordinary care and prudence he would not be liable, provided the injury would not have happened but for the want of ordinary care and prudence on the part of the plaintiff; that in determining the amount of care and prudence to be required of the plaintiff, they need not measure it by the rule that would be applicable to an adult, but might consider that he was a child of four years of age, from whom a less degree of care and prudence might be expected; that if they believed the plaintiff acted on that occasion as a child of his age and capacity would be expected to act, they might consider his want of the care and prudence of an adult as no objection to his recovery; that if the boy were of so tender years as to be absolutely incapable of observing and avoiding travelers, it might be gross negligence in the parents to permit him to be in the street, and in such case the defendant would not be liable, unless he was also guilty of gross negligence; but if the plaintiff were an active boy, of sufficient age to attend school, and if children of his age and capacity would ordinarily be allowed and expected to attend school, and be in the street, as he was, then there would be no gross negligence on the part of the parents, though the boy might not have the prudence and capacity of a man to avoid danger. The court further instructed the jury that in case they found the plaintiff was not wanting in care and prudence, it would then be their duty to inquire into the alleged negligence of the defendant; that in determining the question of such negligence they should take into consideration the size and character of the defendant's load, the condition of the road, the steepness of the hill, the speed of the driving, the usual amount of travel on the road, and the fact,

especially if they found it to be known to the defendant, that the hill was commonly used by boys for sliding; that in that case more care would be required than in a place less frequented; that if they found that the defendant was in the exercise of such common care and prudence as from all the circumstances ought to be reasonably required of him, and the injury was unavoidable, they ought to excuse him from liability; but if they found that he was driving in a careless and negligent manner, without the exercise of common care and prudence, and that the injury occurred by reason of his carelessness and neglect, their verdict should be against him. The jury returned a verdict for the plaintiff.

C. B. Harrington, for the defendant.

D. Roberts, jun., for the plaintiff.

By Court, REDFIELD, J. The general principles of law applicable to the subject of actions for negligence are well settled, no doubt, and familiar to the profession. They are, perhaps, sufficiently well expressed by Lord Ellenborough, C. J., in *Butterfield v. Forrester*, 11 East, 60: "One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action—an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." This is substantially the formula, which, since that time, has been followed, in charging juries with road cases; and, as a general rule, it is unobjectionable.

But in its application to the multiplicity of cases which occur, and the almost endless variety of incidents attending injuries of this character, it is not uncommon that perplexing doubts will spring up, which this general formula is wholly insufficient to solve. Hence this case has been somewhat questioned, perhaps it may be said, criticised, certainly, in the later cases, both English and American: See *Marriott v. Stanley*, 39 Eng. Com. L. 559, note a. But the remarks of the learned judge, as applicable to the case before him (and we have, perhaps, no right to give them any other application), are most unquestionably sound. The conduct of both the parties, in that case, was certainly very singular, and the case hardly a precedent for any other. But the principle stated by the learned judge is of universal application to similar cases. In order to sustain the action on the case for negligence of the defendant, it must appear that the injury did not occur from any want of ordinary

care on the part of the plaintiff either in whole or in part. In other words, if ordinary care on the part of the plaintiff would have enabled him to escape the consequences of the defendant's negligence, he has no ground of complaint. He may be said, in such a case, to have been himself the cause of any injury which he may have sustained under such circumstances. Hence we notice, in the trial of this class of cases by the English judges, at *nisi prius*, the question is stated in that form, and the jury are directed first to say whether the injury occurred from the misconduct of the plaintiff. If so, the defendant has a verdict of course. If not, the jury are, where any such doubt arises, required to say whether the injury occurred from inevitable accident or the negligence or misconduct of the defendant: *Cotterill et Ux. v. Starkey*, 8 Car. & P. 691; S. C., 34 Eng. Com. L. 587. And the rule holds that the plaintiff can not recover if his want of ordinary care in part contributed to produce or to enhance the injury: *Marriott v. Stanley*, above cited. The English books are full of cases to this point. So, too, where the proof leaves the case merely doubtful whether the injury is fairly attributable to the defendant's wrong or to that of the plaintiff, the case is not made out.

The case of *Bridge v. Grand Junction Railway Co.*, 3 Mee. & W. 244, seems to us not to have essentially qualified the rule laid down by Lord Ellenborough in *Butterfield v. Forrester*, 11 East, 60. It is, indeed, in this case expressly decided that a plea alleging that the injury was the joint result of carelessness in the agents of both railways in managing each of the trains which came in collision, is no bar to the action. Lord Abinger, it is to be observed, assigns no reason why he considers the plea bad in substance. So, too, the other barons assign no reasons, except Parke, B., who does say, "That unless he [the plaintiff] might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover." In *Davies v. Mann*, 10 Mee. & W. 545, the same court expressly decide that the fact that the plaintiff was somewhat in fault is not sufficient to preclude a recovery on his part, and reiterates the same declaration by Parke, B., that, "the negligence which is to preclude a plaintiff from recovering in an action of this nature must be such as that he could by ordinary care, have avoided the consequences of the defendant's negligence."

These cases seem to me correctly decided; but the language of Parke, B., may be, perhaps, liable to some degree of

criticism. I should hesitate to say, that if it appeared that the want of ordinary care on the part of the plaintiff, at the very time of the injury, contributed either to produce or to enhance the injury, he could recover; because it seems to me that is equivalent to saying that the plaintiff, by the exercise of ordinary care at the time, could have escaped the injury. The defect, in substance, in the plea in *Bridge v. Grand Junction Railway Co.*, seems to be, that there was no allegation of any misconduct on the part of the plaintiff or his agents; for *non constat* that the engineers and conductors of the train on which the plaintiff was conveyed were so situated in regard to the plaintiff, that he was to be affected by their misconduct. No doubt, if the collision occurred altogether through the misconduct of the conductors of the train upon which the plaintiff was conveyed, the defendants are excused, although they might have, at the time, been guilty of some degree of negligence which did not contribute to the injury. But I am not prepared to say that in the ordinary case of a collision on a railway, by the misconduct of the agents and servants of both roads, the passengers are compelled to resort to that company upon whose railroad they are conveyed. But one would not be ready to say, confidently, such is not the rule of law without more consideration than I have been able to give the subject. But we can readily suppose cases, where no such rule could possibly obtain, and, for aught appearing in the report of the case, that was such a case. So that it seems to me the words of Parke, B., are altogether beyond the scope of the case, and, as I think, too general, and require qualification.

But the case of *Davies v. Mann*, 10 Mee. & W. 545, seems to me to merit a different consideration from that of *Bridge v. Grand Junction Railway Co.*, 3 Id. 244. In that case the beast, which was run over by the defendant's team, was, of course, incapable of exercising care or prudence. The only question, which could be made in the case, is in regard to negligence on the part of the plaintiff—whether it was ordinarily safe in him to suffer the animal, a donkey, to be in the road fettered. Lord Abinger says it does not appear but “the ass was lawfully in the highway”—and if it did, “it would make no difference, for, as the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there.” This brings this case within the principle of those cases, which have been decided, in regard to setting spring guns, sharp

knives, etc., on one's own grounds, for the protection of game, where persons, having no reason to suspect such weapons were so set, have, by trespassing on such grounds, been seriously injured, and have, notwithstanding their own misconduct, been suffered to recover damages of the owner of the grounds—for the reason, perhaps, that such acts were esteemed gross negligence in the land owners.

And this seems to us to be carrying the rule further than is necessary to entitle the plaintiff to retain his verdict in the present action. Here the jury have found that the plaintiff was properly suffered by his parents to attend school at the age and in the manner he did, and that the injury happened through the ordinary neglect of the defendant; or, if not properly suffered to go to school, then that the defendant was guilty of gross neglect; for the judge put the case in the alternative to the jury, and they have found a general verdict for the plaintiff. And we are satisfied, that although a child, or idiot, or lunatic, may, to some extent, have escaped into the highway through the fault or negligence of his keeper, and so be improperly there, yet, if he is hurt by the negligence of the defendant, he is not precluded from his redress. If one know that such a person is in the highway, or on a railway, he is bound to a proportionate degree of watchfulness, and what would be but ordinary neglect, in regard to one whom the defendant supposed a person of full age and capacity, would be gross neglect as to a child, or one known to be incapable of escaping danger: *Boss v. Litton*, 5 Car. & P. 407; S. C., 24 Eng. Com. L. 384.

The only remaining inquiry is, whether a plaintiff of the tender age of this plaintiff is bound to the same rule of care and diligence on his part, in avoiding or escaping the consequence of the neglect of others, which is required of persons of full age and capacity, in order to maintain his action for redress. In *Lynch v. Nurdin*, 1 Ad. & El., N. S., 28; S. C., 41 Eng. Com. L. 422, the question came directly under review before the queen's bench, and was very learnedly discussed and fully considered, and that court very fully determined that no such rule of diligence can be applied to an infant plaintiff of very tender years. Lord Denman, C. J., after citing the opinion of Lord Ellenborough in *Butterfield v. Forrester*, 11 East, 60, says: "Ordinary care must mean that degree of care which may reasonably be expected of a person in the plaintiff's situation, and this would evidently be very small indeed in so young a child." The whole case goes upon the ground, that all which is to be

required of the plaintiff is care and prudence equal to his capacity. We see no reason, whatever, to doubt the perfect soundness of the decision. Indeed, any other rule would be wholly impracticable, and must ultimately be abandoned by courts, because juries could not be made to act upon any such artificial and arbitrary rules of determination.

What is reasonable skill, proper care, and diligence, etc., can only be determined, as matter of fact, by the jury. It is impossible to establish any general rule upon so indefinite a subject; and it is impossible to make juries, or merely practical men anywhere, determine these matters, except upon the circumstances of each particular case. It is true, no doubt, that the defendant in such cases is to be allowed a favorable construction of his own conduct, with reference to what he had reason to expect of the other party at the time. One might possibly injure a deaf or blind man without fault, through ignorance of his infirmity, expecting him to conduct differently from what he did. But in the case of a child four years old, there could be no doubt the defendant was bound to the utmost circumspection, and to see to it that he did not allow his team to acquire such impetus, after he saw the child, that he could not check them, or avoid injury to the child.

We have not felt bound to go into an extended review of the case of *Hartfield v. Roper*, 21 Wend. 615 [34 Am. Dec. 273], for the facts in that case and the finding of the jury in this case have made so wide a difference in the two cases, that one is no guide to the determination of the other. The case of *Hartfield v. Roper* is, so far as it has any application to the present case, although at variance with that of *Lynch v. Nurdin*, and far less sound in its principles, and infinitely less satisfactory to the instinctive sense of reason and justice.

Judgment affirmed.

CONTRIBUTORY NEGLIGENCE ON PART OF PLAINTIFF, EFFECT OF: See *Birge v. Gardner*, 50 Am. Dec. 261, note 263, where other cases are collected; *Tonawanda R. R. Co. v. Munger*, 49 Id. 239, and note. The principal case is cited in *Murphy v. Deane*, 101 Mass. 466, to the point that where the negligent conduct of the two parties is contemporaneous, and the fault of each relates directly and proximately to the occurrence from which the injury arises, the rule of law is rather that the plaintiff can not recover, if by due care on his part he might have avoided the consequences of the carelessness of the defendant; and in *Wright v. Malden & M. R. R. Co.*, 4 Allen, 287, as a case following the doctrine of *Lynch v. Nurdin*.

THAT MAY BE GROSS NEGLIGENCE IN CASE OF CHILD of tender years which would only be ordinary negligence in the case of a person of full age: See

Birge v. Gardner, 50 Am. Dec. 281, note; *Lucas v. Taunton & N. B. R. R. Co.*, 6 Gray, 71; *Miller v. McCloskey*, 1 Civ. Pro. R. (N. Y.) 263; *Kerr v. Fergae*, 54 Ill. 484, the last three citing the principal case.

PAUL v. SLASON ET AL.

[22 VERMONT, 281.]

DOCTRINE THAT OFFICER BECOMES TRESPASSER AB INITIO when he abuses the authority given him by law, has never been extended to any case, except where there has been a clear, substantial violation of the plaintiff's rights, and of such a character as to show a wanton disregard of duty on his part.

OFFICER IS NOT LIABLE AS TRESPASSER AB INITIO FOR USING personal property attached by him, unless it has been injured by him, or been used by him for his own benefit, or for the benefit of some person other than the debtor.

WHERE OFFICER IS SEEN DRIVING HORSE AND WAGON that had been attached by him, the jury may infer, in the absence of proof to the contrary, that he was removing them to a place for conveniently keeping them while subject to the attachment.

WHEN INVASION OF RIGHT IS ESTABLISHED, LAW GIVES NOMINAL DAMAGES, although no actual damage be shown. But damages will not be given for a trespass to personal property when no unlawful intent, or disturbance of a right or possession is shown, and when not only all probable but all possible damage is expressly disproved.

OFFICER IS NOT LIABLE IN TRESPASS FOR USING PITCHFORK OF DEBTOR in attachment for the purpose of removing certain hay and grain attached by him, where, after the removal, he leaves the fork where he found it, and does it no injury. The maxim *De minimis non curat lex*, is peculiarly applicable in such a case.

ORIGINAL FILES AND RECORD OF SUPREME COURT ARE ADMISSIBLE in evidence to prove that a judgment was rendered in the case.

COUNTY COURT HAS NO POWER TO PERMIT SHERIFF TO AMEND his return upon an execution, which he has returned to the clerk's office, for the purpose of making such execution competent evidence in a case on trial. But its judgment will not be reversed for such error where it is evident that the result of the trial was not in any way affected by it.

OFFICER ATTACHING PROPERTY ON MESNE PROCESS IS NOT RESPONSIBLE for any irregularity of another officer in selling the property on execution.

TRESPASS for taking certain property. Plea, the general issue, with notice that defendant Slason attached the property by virtue of a writ which he was legally deputized to serve, in favor of one Langdon, against the plaintiff, and that the other defendants aided him at his request. Among other things offered in evidence by the defendants, as stated in the opinion, was the return of one Edgerton, as sheriff, upon the execution issued in the

case of *Langdon v. Paul*, offered for the purpose of showing that the wagon mentioned in the opinion was sold thereon, and that the proceeds were applied in payment of the debt. The plaintiff objected to the admission of this evidence, upon the ground that it appeared from the return that the property was sold two days after the sheriff received the execution for service, as shown by his indorsement on it. The counsel for defendants then suggested that there was a mistake in the return, and moved that the sheriff have leave to amend it. The plaintiff objected, but the court permitted the sheriff to amend his return so as to state the day of sale to have been one month later than was stated in the original return. The defendants then offered in evidence the return as amended. The plaintiff objected, but his objection was overruled. The jury returned a verdict for the defendants. The other facts appear from the opinion.

M. G. Everts and Thrall and Smith, for the plaintiff.

E. Edgerton, for the defendants.

By Court, POLAND, J. The first question, arising in this case, is in relation to the charge of the county court to the jury as to the use of the horse, wagon, and harness by the defendants, in removing the other property of the plaintiff, which was attached at the same time. The jury were charged, that if they were only used in removing the other property, and were not injured or lessened in value thereby, such use would not make the defendants trespassers *ab initio*.

It was an early doctrine of the common law, that when a party was guilty of an abuse of authority given by the law, he became a trespasser *ab initio*, and lost the protection of the authority under which he originally acted—as, if beasts, taken damage feasant, or distrained for rent, were killed, or put to work, by the party taking them, he might be sued in trespass as for an original wrongful taking. This doctrine has fully obtained in this country, and was acted upon by this court in the case of *Lamb v. Day et al.*, 8 Vt. 407 [30 Am. Dec. 479], where it was held, that the defendants, who had attached the plaintiff's mare (one being creditor and the other officer), and worked her for several weeks in running a line of stages, without the plaintiff's consent, became trespassers *ab initio*. The doctrine has, to our knowledge, never been extended to any case, except where there has been a clear, substantial violation of the plaintiff's rights, and of such a character as to show a wanton disregard of duty on the part of the defendants. Were the acts of

the defendants, in using the horse, wagon, and harness under the circumstances and for the purposes mentioned in this case, such an abuse of the property, and of the authority under which it was taken, as ought to deprive them of the benefit of its protection?

It was the duty of the officer to remove the property, in order to make his attachment effectual, and the expense of such removal must be borne by the debtor; and instead of the plaintiff being injured by the use of the property, he was really benefited by it. The doctrine, for which the plaintiff contends, goes the extent of saying, that any use of the property makes the officer a trespasser; so that if an officer attach a horse and wagon, and use the horse for the purpose of drawing away the wagon from the possession of the debtor, he becomes a tortfeasor. We are wholly unable to satisfy ourselves that the law has ever gone to so unreasonable an extent, or has ever been applied to any case, except those where the property has been injured, or has been used by the officer for his own benefit, or for the benefit of some one other than the debtor. This was the rule laid down by the county court, and we are fully satisfied of its correctness.

2. The next question arises upon the charge to the jury in relation to the driving of the horse and wagon by the officer on the next day after the attachment. The case states that the officer was seen driving the horse and wagon in the highway, but upon what business did not appear. The jury were charged, that if they found that the officer was using the horse and wagon for other purposes than that of removing and securing them in a place for conveniently keeping them, while under the attachment, the defendants would be liable—otherwise not.

The officer, no doubt, had the right to drive the horse and wagon for the purpose suggested in the charge; but the plaintiff claims, that the legal presumption should be, in the absence of express proof as to the object and purpose of driving the horse and wagon, that it was for an unlawful purpose. But in our opinion this would be contrary to the ordinary rule of legal presumption in relation to all persons, and especially persons acting under legal authority. *Omnia præsumuntur rite acta*, is a maxim which is always applied to the conduct of persons acting under the authority of law. Although there was no direct evidence as to the object and purpose of driving the horse and wagon, the jury might well infer the object from the time, circumstances, and direction of the driving; and we think it was

properly left to them to determine. We think it was upon the plaintiff to show the act of the officer to be unlawful; and if he had it left to the jury to decide, even without any evidence to prove it, we do not see that he has any ground of complaint.

3. Another question is also raised upon the charge to the jury in relation to the use of the pitchfork by the defendants. Under the charge the jury must have found, that the pitchfork was used by the defendants only in moving the plaintiff's property, that it was left where they found it, that the plaintiff received it again, and that it was in no way or manner injured. They were told by the court, that if they found all these facts proved, they were not obliged to give the plaintiff any damages for the fork.

It is true, that by the theory of the law, whenever an invasion of a right is established, though no actual damage be shown, the law infers a damage to the owner of the property and gives nominal damages. This goes upon the ground, either that some damage is the probable result of the defendant's act, or that his act would have effect to injure the other's right, and would be evidence in future in favor of the wrong-doer. This last applies more particularly to unlawful entries upon real property, and to disturbance of incorporeal rights, when the unlawful act might have an effect upon the right of the party and be evidence in favor of the wrong-doer, if his right ever came in question. In these cases an action may be supported, though there be no actual damage done—because otherwise the party might lose his right. So, too, whenever any one wantonly invades another's rights for the purpose of injury, an action will lie, though no actual damage be done; the law presumes damage, on account of the unlawful intent. But it is believed, that no case can be found where damages have been given for a trespass to personal property, when no unlawful intent, or disturbance of a right, or possession is shown, and when not only all probable, but all possible, damage is expressly disproved.

The English courts have recently gone far towards breaking up the whole system of giving verdicts, when no actual injury has been done, unless there be some right in question, which it was important to the plaintiff to establish. In the case of *Williams v. Mostyn*, 4 Mee. & W. 145, where case was brought for the voluntary escape of one Langford, taken on mesne process, and it was admitted that the plaintiff had sustained no actual damage or delay, the defendant having returned to the custody of the plaintiff, a verdict was found for the plaintiff for

nominal damages. But on motion, the court directed a nonsuit to be entered, saying that there had been no damage in fact or in law. So in a suit brought by the owner of a house against a lessee, for opening a door without leave, the premises not being in any way weakened or injured by the opening, the court refused to allow nominal damages, and remitted the case to the jury to say whether the plaintiff's reversionary interest had in point of fact been prejudiced: *Young v. Spencer*, 10 Barn. & Cress. 145; S. C., 21 Eng. Com. L. 70. Mr. Broome, in his recent work on legal maxims, lays down the law in the following language: "Further, there are some injuries of so small and little consideration in the law, that no action will lie for them; for instance, in respect to the payment of tithes, the principle which may be extracted from the cases appears to be, that for small quantities of corn, involuntarily left in the process of raking, tithe shall not be payable, unless there be any particular fraud, or intention to deprive the parson of his full right."

If any further authority is deemed necessary, in support of the ruling of the county court on this point, we have only to refer to that ancient and well-established maxim, *De minimis non curat lex*, which seems peculiarly applicable in this case, and would alone have been ample authority upon this part of the case; for we fully agree with Mr. Sedgwick, that the law should hold out no inducement to useless or vindictive litigation: Sedg. on Dam. 62. This disposes of all the questions raised upon the charge.

4. The remaining questions in the case arise upon the admission of the original files and record of the case of *Langdon v. Paul*, 20 Vt. 217. The plaintiff objected to the introduction of the original record, and claimed that the judgment could only be proved by an exemplified copy of the record. But we think the objection not well founded. If the clerk of the supreme court were willing to bring the original record into court, we think it might well be used. He probably could not be compelled to do so, and might have required the party to procure a copy of the same; but when the original record is brought into court, we think it would be very difficult to give any substantial reason why it is not evidence of as high a character as a copy of the same record would be. The practice of receiving original records as evidence has been universal, as we believe, in this state, and is often much more convenient than to procure copies: *Nye et al. v. Kellam*, 18 Id. 594.

In relation to the amendment of the execution by the officer.

it is very clear that the county court had no power to permit any such amendment; but we can not perceive that the case was in any way affected by it. If the officer who held the execution was guilty of any irregularity in his proceedings in the sale of the wagon upon the execution, it could not have the effect to make these defendants trespassers, who took the property rightfully, and were in no way responsible for the act of the sheriff, who had the execution.

We find no error in the proceedings of the county court, and their judgment is affirmed.

OFFICER, WHEN TRESPASSER AB INITIO: See *Hooker v. Smith*, 47 Am. Dec. 679, note 682, where other cases are collected.

AMENDMENT OF OFFICER'S RETURN: See *Fairfield v. Paine*, 41 Am. Dec. 357, note 363, where other cases in this series are collected.

INFRINGEMENT OF LEGAL RIGHT CONSTITUTES CAUSE OF ACTION FOR DAMAGES, although no actual damage is proved: *Chapman v. Thames Mfg. Co.*, 33 Am. Dec. 401; *Simonds v. Pollard*, 53 Vt. 345, citing the principal case.

PRATT v. JONES.

[22 VERMONT, 341.]

ACTION OF DEBT WILL NOT LIE ON JUDGMENT which appears of record to be satisfied by levy of execution upon real estate, regular upon the face of it. The record must be held conclusive until, by some proceeding brought to operate directly upon the record itself, the levy is avoided.

WHERE, IN ACTION OF DEBT ON JUDGMENT, DEFENDANT PLEADS SATISFACTION of the judgment by a levy thereunder by the plaintiff, and the plaintiff in reply merely traverses this plea, the issue so raised does not involve any inquiry as to the validity of the levy, but only whether the execution appeared of record to be satisfied.

DEBT on judgment. Pleas, *nul tiel record*; payment; and that the plaintiff had caused the amount of the judgment, and all interest, costs, and charges, to be levied and fully satisfied of the lands and estate of the defendant. These pleas were traversed, and issue joined. It appeared that the plaintiff recovered the judgment on which this action was brought; that execution issued thereon, which was returned satisfied by a levy upon land of the defendant. The return was regular in form, and the land levied upon was described by metes and bounds. At the time of the levy there was on record a mortgage from the defendant to one Warren, which included the land levied on, with other lands: and at the time of the trial there was a bill to

foreclose this mortgage pending in the court of chancery. There was no evidence tending to show that this mortgage had been discharged. The county court gave judgment for the plaintiff. Other facts appear from the opinion.

Tracy, Converse, and Barrett, for the defendant.

O. P. Chandler, for the plaintiff.

By Court, REDFIELD, J. There are some questions, in regard to the form of the issue and the sufficiency of proof to show that the mortgage was a subsisting security at the date of the levy, which we shall not stop to discuss at length. It seems to me that the issue does not in fact involve any inquiry as to the validity of the levy, but only whether the execution appeared of record to be satisfied, or, in other words, was satisfied of record. If the plaintiff wished to show, by matter *dehors* the record, that the execution was not in fact satisfied, and if such a showing could avail the plaintiff, in this form of action, it should, I think, be distinctly so pleaded. A stranger to these pleadings would not understand the plaintiff to claim that the levy made was invalid by reason of the debtor having only a mortgage interest in the land, but would conclude that the plaintiff would undertake to show that no levy whatsoever was made. This form of pleading would doubtless be well enough where the defect was apparent upon the levy itself. And in such a case the action of debt is manifestly the appropriate remedy, and this the proper form of pleading. And the fact that the plaintiff's counsel so felt the incongruity of the thing as to decline the attempt to amend the record by alleging matter *in pais, dehors* the record, shows a lurking consciousness that the case required a departure from the usual course; and hence this form of pleading might have been adhered to, in order to escape the consequences of encountering a demurrer.

The same remarks, substantially, apply to the matter of proof offered in the county court. There was no positive proof whatever that the mortgage remained a subsisting security upon the land. And as the date of the mortgage was more than fifteen years prior to the levy, and almost twenty-five years prior to the time of trial, the natural and legal presumptions would concur in its being paid off.

But in regard to the question, involved in the very foundation of this action, and which has been chiefly discussed at the bar, whether an action of debt will lie upon a judgment which appears of record to be satisfied by levy of execution upon real

estate, regular upon the face of it, we have given to it all the consideration which the time would allow, and we entertain no doubt that the case, upon that point, is clearly with the defendant.

This is a question which attracted the attention of the profession, and came to be considered by the courts at a very early day; and the traditionary bearing [judicial leaning] has certainly been altogether adverse to any such remedy. The subject certainly came before this court as early as the case of *Baxter v. Tucker*, 1 D. Chip. 353, and was somewhat extensively examined and discussed by one of the ablest courts who have ever occupied these seats—and to say this is not to disparage others. That was *scire facias* to obtain a new execution, where the former one had been levied upon an estate not belonging to the debtor, which remedy is given by our statute. Chief Justice Chipman, in giving judgment, says: “The plaintiff could not have the common-law remedy, either of debt or *scire facias*. By the return of the execution the judgment appears on record to be satisfied. To a plea of this in bar the plaintiff could in such case make no sufficient replication; so that he was at common law without remedy.” “This remedy is given by the statute.” This determination certainly covers the present case in all its parts. For the only defect in the present case complained of is, that the debtor did not own the estate levied upon, but a lesser estate. And this decision being made almost forty years ago, and having been fully acquiesced in by all, and our legislation conformed to it, by giving the creditor a remedy to obtain a new execution by petition to this court, we should, at this late day, feel reluctant to depart from it, if there were serious doubt of its soundness upon common-law principles, which we think there is not. This case decides, too, that it is incumbent upon the creditor, seeking a new execution upon the ground of defect of title in the debtor to the estate levied upon, to show by positive evidence, *prima facie*, that such defect existed, and that he can not for this purpose call upon the debtor to show his title affirmatively. This will apply to the matter of proof, in the present case, after a presumption against the continuance of the mortgage is raised, by lapse of time. The same view of the law upon this subject was taken by this court in *Royce v. Strong*, 11 Vt. 248, and in *Hyde v. Taylor*, 19 Id. 599. And in *Dimick v. Brooks*, 21 Id. 569, it was attempted to be shown that debt upon record can not be aided by averment of matter *in pais*, *dehors* the record. To what is there said I could add nothing here.

We think, then, in conclusion, that the record, and the record only, must be held conclusive until, by some proceeding brought to operate directly upon the record itself, the levy is avoided. This was done in *Hurlbut v. Mayo*, 1 D. Chip. 387, by *audita querela*, and may now always be done by petition to this court under the statute. The case of *Lawrence v. Pond*, 17 Mass. 433, conforms to the view here taken.

Judgment reversed, and judgment for defendant, upon the issue joined, and the facts found by the county court, unless the plaintiff elect to become nonsuit.

SATISFIED JUDGMENT, SALE UNDER EXECUTION ON: See *Reed v. Austin's Heirs*, 45 Am. Dec. 336; *Wood v. Colvin*, 38 Id. 598, note 600; *Russell v. Huguenin*, 33 Id. 423; *Van Campen v. Snyder*, 32 Id. 311; *Hoffman v. Strohecker*, Id. 740; *Boren v. McGee*, 31 Id. 695.

NORTHROP v. SANBORN.

[22 VERMONT, 423.]

ORDER DRAWN FOR "37.89" WITHOUT ANY "\$" IS NOT VOID, as being unintelligible; but the court will intend that the figures are used as whole numbers and decimals to express the national currency of the United States.

WHERE CREDITOR DRAWS ORDER ON HIS DEBTOR, upon which the latter indorses an agreement to pay what may be due after a settlement, the debtor is, after an attempt at settlement has failed, justified in paying the whole amount of the order, and may recover judgment against the creditor for the balance which he paid over and above the amount found to be due, in an action brought by the creditor against him.

BOOK-ACCOUNT. The action was commenced before a justice of the peace and appealed to the county court. The county court rendered judgment to account, and appointed an auditor, who reported the following facts: In July, 1848, the defendant owed the plaintiff eighty dollars; on August 9, 1848, the plaintiff drew an order on the defendant in these words: "Please to pay the bearer, Joseph B. Clough, 37.89, and I will account to you for the same on settlement." The order was presented to the defendant, and on the eleventh day of August, 1848, he wrote on it these words: "The undersigned agrees to pay to J. B. Clough what may be due to A. Northrop after settlement. Thomas G. Sanborn." On November 6, 1848, the plaintiff and defendant and Clough met for the purpose of making a settlement, but did not settle, and the next day the plaintiff commenced this action. At various times thereafter the defendant

paid to Clough, in different sums, the full amount of the order. The auditor allowed to the defendant the sums so paid, and reported that there was due from the plaintiff to the defendant twelve dollars and forty cents; but if those payments were improperly allowed, there was due from the defendant to the plaintiff thirteen dollars and forty-nine cents. The county court rendered judgment for the defendant on the report.

———, for the plaintiff.

A. Howard, jun., for the defendant.

By Court, REDFIELD, J. We think it not necessary to say that the order, expressed for "37.89," is so far unintelligible, that it is void. The law of the United States congress, establishing our national currency, having declared that it shall consist of the dollar, as a unit, and the decimal parts of the dollar, as dimes and cents, it would seem the necessary legal intendment, that a contract expressed in figures should be in the currency of the country. If prefixed by the usual sign (\$), no one could entertain doubt; and that is nothing but a mark to signify that the national currency is intended. Without that, we think the legal intendment is the same.

It may be thought, by some, that this decision conflicts with that of *Clark v. Stoughton*, 18 Vt. 50. But perhaps not necessarily so. In that case it was held, that such a mode of expressing value is not sufficient, in a declaration, or plea, because it is not a compliance with the statute, requiring the pleadings and proceedings in the courts of justice to be in the English language. The purpose of that statute probably was, to prevent the profession from excluding the parties from being their own counsel, if willing to brave the consequence of having fools for clients, as the old maxim has it. And in that view, the mode of expressing value, condemned in *Clark v. Stoughton*, was the kind of vernacular which the statute was intended to vindicate and encourage.

But we are aware that such marks as \$, £, and the like have not been considered admissible in pleadings in the English courts. So, also, "A. D." was lately condemned there, as vitiating a declaration, and the party was compelled to pay the whole costs of the suit, to procure an amendment—Chief Justice Tindal saying, that "A. D." was neither English nor Latin: Warren's Duties of Attorneys and Solicitors, 137. So, also, we find in the English courts a writ is held fatally defective, if addressed to the sheriff, instead of the sheriffs of London—the

singular for the plural number: *Moore v. Magan*, 16 Mee. & W. 95. So, too, in the English courts the initial letters of the name are not sufficient; and declarations in that form have in late years been held fatally defective.

But in this state no such strictness, even in pleadings, has of late been attempted. Since the case of *State v. Hodgeden*, 3 Vt. 481, where "A. D." was considered sufficient, even in an indictment, and of *State v. Gilbert*, 13 Id. 647, where *Anno Domini* was held to be sufficiently English to be admitted in pleadings, even in an indictment, I should myself have supposed, were it not for the case of *Clark v. Stoughton*, that this mode of expressing value was sufficient, even in a plea. We have no doubt it is sufficient in a contract, where any language which is intelligible is competent.

And after the order was drawn and accepted, the defendant was bound to pay the balance of the amount to Clough; and we do not see why he was not justified, as between himself and the plaintiff, in paying the full amount of the order.

Judgment affirmed.

CITED in *National Bank of Rockville v. National Bank of Lafayette*, 69 Ind. 485, to the point that where the amount of a check is written in figures without the sign "\$" prefixed, the first number should be read as dollars and the second as cents; and in *Beardsley v. Hill*, 61 Ill. 359, as holding that an order to pay 37.89 was not so unintelligible as to be void. It was decided in *Clark v. Stoughton*, 44 Am. Dec. 361, that the dollar-mark prefixed to Arabic numerals is not a part of the English language. But see note to that case, page 362, and the cases there cited.

NICHOLS & BLISS v. BELLOWS.

[22 VERMONT, 581.]

RIGHT TO SUE FOR TORT IS NOT SUCH RIGHT OF PROPERTY as vests in the assignee of a bankrupt, under the United States bankrupt act of 1841.

FORM OF ACTION IN ASSUMPSIT TO RECOVER BACK USURY, given by the statute to the party who has paid it, is no less a mode of redressing an injury caused by personal wrong and oppression, than if the action sounded wholly in tort.

RIGHT TO SUE FOR USURY PAID BY BANKRUPT does not vest in his assignee.

IN ACTION TO RECOVER BACK MONEY PAID AS USURY ON NOTE signed by the plaintiff and by several others as sureties, one of such sureties is a competent witness for the plaintiff, notwithstanding he may have agreed to indemnify another surety against the note.

PAYMENT OF USURY ON NOTE OPERATES IN LAW AS PART PAYMENT of the note, where the security on which the payment is made includes

both the loan and the stipulated usury. But when separate securities are given for the usury, whether at the time of the negotiation of the loan or afterwards, and the usury, when paid, is applied on such securities, the debtor is at liberty to treat such a payment as having no connection with the legal demand, and bring his action to recover it back.

ASSUMPSIT brought by the plaintiffs to recover from the defendant certain moneys alleged to have been paid to him as usury. On the trial the plaintiffs called one Griffin as a witness, whose testimony tended to prove that the plaintiffs, who were partners, as principals, and one Packard and one Wales and the witness, as sureties, executed a note to the defendant; that the plaintiffs, in consideration of the loan, agreed to pay to the defendant six per cent. extra interest for the use of the money; that the extra interest for the first year was included in a separate note, which was signed by the plaintiffs; that the last-mentioned note was paid by Nichols at the end of the first year; that another similar note was then executed by the plaintiffs for the extra interest for the second year, which was paid at the end of that year. This witness also gave evidence tending to prove that the original note had been paid before the commencement of this suit. The defendant offered in evidence the record of the district court of the United States for the district of Vermont, from which it appeared that the plaintiff Bliss had filed his petition in bankruptcy and had afterwards obtained his certificate of discharge. This evidence was, on the objection of the plaintiffs, excluded. The defendant then called Packard, one of the signers of the original note, who testified that he had never paid any part of the note, but that the plaintiff Nichols and the witness Griffin had executed to him a bond of indemnity against said note, which bond this witness still held against Griffin. The defendant then requested the court to instruct the jury to disregard the testimony of Griffin, for the reason that it appeared that he was interested. But the court charged the jury that the testimony of Griffin was proper testimony. There was a verdict for the plaintiffs. The other facts sufficiently appear from the opinion.

Platt and Peck, for the defendant.

Smalley and Phelps, for the plaintiffs.

By Court, ROYCE, C. J. Several objections are taken to the right of the plaintiffs to recover. It is insisted that the cause of action in favor of the plaintiff Bliss passed to his assignee in bankruptcy, who should have joined with the other plaintiff

in bringing this action. To sustain the objection the defendant relies on the words of the United States bankrupt act of 1841, which professed to transfer to the assignee all the bankrupt's "property and rights of property, of every name and nature." This sweeping enactment undoubtedly extended to everything which would properly go to make up a full inventory of the bankrupt's estate—all his means consisting of tangible property, and rights of property, which could be expected to be made available for the payment of debts. But the right to sue for torts is not a right of property in any such sense. It is simply a right of redress, which is personal to the party injured, and which he may decline to enforce at his election. And though the statute has given a form of action in *assumpsit* by which a party, who has paid usury, may recover it back, yet this remedy, in legal contemplation, is no less a mode of redressing an injury caused by personal wrong and oppression than if the action sounded wholly in tort: *Barker v. Esty*, 19 Vt. 131. We consider that no right to sue for the usury claimed ever vested in the assignee of Bliss, and that the record of the proceedings in bankruptcy was correctly excluded.

It is also claimed that the witness Griffin was incompetent to testify for the plaintiffs, on the ground of interest. I shall not inquire whether the objection to this witness was seasonably taken at the trial. If the note of eight hundred dollars, given for the loan, and which the witness signed as surety, had been fully paid (as the evidence tended strongly to prove), he could have had no interest at the time of testifying. And if it had not been paid, he was rather interested to have the usury remain in the defendant's hands, that it might be applied, by equitable offset, or otherwise, in part satisfaction of that note. It is not perceived how the fact of the witness, having agreed to indemnify another surety upon the note, could operate to create an interest in this suit in favor of the plaintiffs, whether the note had or had not been paid.

The remaining objection is, that the usury, when received by the defendant, went, by operation of law, in part payment of the note for eight hundred dollars, though such an application was not contemplated by the parties. And that such will be the effect, where the security on which the payment is made includes both the loan and the stipulated usury, is doubtless well settled. That was the case of the first sum of thirty-two dollars, mentioned in *Ward v. Sharp*, 15 Vt. 115. So a general payment, upon what the borrower owes the lender, will be applied by the

law to a debt legally due, and not in satisfaction of any usurious stipulation. But when separate securities are given for the usury, whether at the time of negotiating the loan or afterwards, and the usury, when paid, is applied upon such securities, the debtor is at liberty to treat such a payment as having no connection with the legal demand, and bring his action to recover it back. This is settled by the cases of *Grow v. Albee*, 19 Id. 540, and *Nelson v. Cooley*, 20 Id. 201, both of which were actions of *assumpsit*, like the present. At the same time he may, at his election, at least in a court of equity, compel the application of such usurious payments upon the lawful debt of the creditor: *Ward v. Sharp*, above cited: *Day v. Cummings*, 19 Id. 496. The plaintiffs are clearly entitled to retain their judgment, and the same is affirmed.

EQUITABLE RELIEF FROM USURIOUS CONTRACT: See *Morgan v. Schermerhorn*, 19 Am. Dec. 449, note 451, where other cases are cited.

ONE WHO HAS PAID USURY MAY RECOVER IT BACK: See *Wheaton v. Hibbard*, 11 Am. Dec. 284; where usury, not included in the note or other security, has been paid but not indorsed, the party paying has his election to sue and recover it back, whether the lawful debt has been paid or not, or to have the usury applied in offset to the lawful debt: *Cross v. Mann*, 53 Vt. 504; *Wells v. Robinson*, Id. 206, both citing the principal case.

STEARNS v. DILLINGHAM.

[22 VERMONT, 624.]

TO ENABLE OWNER OF GOODS TO WAIVE TORT and sue in *assumpsit*, where they have been wrongfully taken from him, the goods must have been converted into money.

WHERE SHEEP OF ONE PERSON BREAK INTO ANOTHER'S PASTURE from time to time, and depasture the same, the owner of the sheep can not, of his own mere motion, waive the tort and sue in *assumpsit* for the pasturing of the sheep; to authorize him to do this, there must have been what would amount to the consent of both parties that it should be considered as a matter resting in contract.

BOOK-ACCOUNT. Judgment to account was rendered, and an auditor was appointed, who reported that the defendant had presented an account against the plaintiff for pasturing his sheep, in reference to which he found the facts which are stated in the opinion.

T. P. Redfield, for the plaintiff.

P. Dillingham, for the defendant.

By Court, BENNETT, J. The law is too well settled to admit of discussion, that to enable the owner of goods to waive the tort and sue in *assumpsit*, where they have been wrongfully taken from him, the goods must have been converted into money. The rule is the same, where the trespass consisted in breaking the plaintiff's freehold and cutting and carrying away the trees standing thereon. The trees must have been sold by the defendant. If, however, in England, the defendant, when sued in *assumpsit*, elect to bring money into court, under a rule obtained for that purpose, this would conclude him from objecting to the form of action. In effect, it would be an admission of the contract, as set up in the declaration. *Bennett v. Francis*, 2 Bos. & Pul. 550, is of this character. Probably the same result would follow from a plea of tender.

The plaintiff, in the present case, was guilty of breaking the defendant's freehold and depasturing the same. The defendant can not, of his own mere motion, waive the tort and sue in *assumpsit* for the pasturing of the plaintiff's sheep. To authorize this, there must have been what would amount to the consent of both parties that it should be considered as matter resting in contract.

While goods which have been wrongfully taken are in custody of the defendant, the action may, by contract, be converted into an action for goods sold and delivered. This is in accordance with well-established cases; and probably the true ground upon which they rest is, that the subsequent assent, to treat the matter as resting in contract, has relation back to the time the goods were taken, and, in legal effect, converts it into a sale of the goods, at the request of the defendant.

Is there enough in this case, found by the auditor, to convert the defendant's claim into contract? If not, it must still rest in tort. The plaintiff's sheep from time to time broke into the defendant's lot through the plaintiff's fence. Word was sent to him to take care of them; but he did not, and the sheep continued to break in, and the defendant continued to turn them out, as well after the word was sent as before—though he made no more personal complaint to the plaintiff about them. When word was sent to the plaintiff to take care of his sheep, he sent no word back to the defendant, but simply remarked that he did not know what he should do with them, and that he expected he should have to pay Dillingham for the running of his sheep in his pasture. These facts do not show any assent to make the pasturing of the sheep matter of contract. The expression, that

the plaintiff expected he should have to pay Dillingham, might well refer to his liability as a tort-feasor, and I think did. He sent no word to the defendant about the sheep, and the defendant continued to turn them out when they got in, as before. There are no facts reported by the auditor from which it can be claimed that the parties understood that the plaintiff was to be liable upon any implied promise to pay for the pasturing of his sheep.

We think, then, this claim can not be allowed to the defendant in this action, and the judgment of the county court must be reversed; and, disallowing this item, judgment must be entered for the plaintiff for ten dollars and seventy-two cents, and interest on that sum, and costs.

WHEN PARTY MAY WAIVE TORT AND SUE IN ASSUMPSIT: See *Osborn v. Bell*, 49 Am. Dec. 275, note 281, where other cases are collected. The principal case is cited in *Watson v. Stever*, 25 Mich. 387, in support of the proposition that damages for a trespass are not in general recoverable in *assumpsit*; and in the case of the taking of personal property, it is generally held essential that a sale by the defendant should be shown.

STATE v. CROTEAU.

[23 VERMONT, 14.]

ON TRIAL OF INDICTMENT FOR SELLING SPIRITUOUS LIQUORS WITHOUT LICENSE the prosecution may, after having offered evidence of the distinct sales charged in the several counts of the indictment, give testimony tending to prove other sales made by the accused at other times within the period named in the indictment.

THAT JURIES HAVE RIGHT AS WELL AS POWER TO RESOLVE BOTH THE LAW and the facts by their general verdict in criminal cases, was a favorite doctrine of the early jurists and statesmen throughout the United States.

ALL QUESTIONS OF LAW AS WELL AS OF FACT, INVOLVED IN ISSUE to the country, were in civil as well as criminal cases anciently resolved by the jury.

ANCIENT MEANING OF MAXIM, *Ad questionem facti non respondent iudices, ad questionem legis non respondent juratores*, was, that the questions of fact appearing on the record should not be answered by the court, nor the questions of law by the jury.

DOCTRINE THAT QUESTIONS OF LAW THAT MIGHT ARISE INCIDENTALLY in the determination of an issue of fact could be separated from the questions of fact, and be left to the decision of the court, otherwise than by demurrer to the evidence, or the finding of a special verdict, was unknown to the ancient common law, and has grown out of the modern practice of granting new trials for a difference of opinion between the court and the jury upon questions of law arising on the trial.

PRIOR TO PRACTICE OF GRANTING NEW TRIALS, JURY ALONE WERE RESPONSIBLE for any error of law in their general verdict, and consequently had the right to determine it in conformity to their own judgment.

JURY WERE ANCIENTLY SUBJECT TO ATTAINT FOR ERROR IN DECIDING the law involved in their general verdict, and were not protected from attainr by following the instructions of the judges in regard to the law, if the instructions turned out to be erroneous, nor were they liable to attainr for disregarding the directions of the judge, if they determined the matter of law correctly.

BILLS OF EXCEPTIONS WOULD NOT LIE FOR MISDIRECTION OF JUDGES to the jury in point of law, while the process of attainr continued in use, for the jury were responsible for the correct decision of such points of law upon that process.

IT WAS ANCIENTLY ADMITTED TO BE PROVINCE OF JURY, in civil cases, to decide in conformity to their own judgment all questions, whether of law or of fact, which were embraced in the issue committed to their charge.

SINCE SUBSTITUTION OF MOTIONS FOR NEW TRIALS AND BILLS OF EXCEPTIONS for the process of attainr, it has become the legal duty of the jury, in civil cases, to comply with the instructions of the court in regard to questions of law.

ANCIENT COMMON-LAW RIGHT OF JURY, IN CRIMINAL CASES, to determine both the law and the fact, remains unimpaired.

COURT HAS NO POWER TO GRANT NEW TRIAL IN CRIMINAL CASE, after a verdict of acquittal has been rendered, however much it may disapprove of such verdict.

PROCESS OF ATTAINT FOR FALSE VERDICT WAS NEVER EXTENDED to prosecutions for crimes.

IN CRIMINAL CASES THERE NEVER WAS ANY REMEDY BY BILL OF EXCEPTIONS, either in England or in the federal courts of the United States.

IN VERMONT ACCUSED MAY, IN CASE OF CONVICTION, FILE EXCEPTIONS to any decision or ruling of the judge on the trial, and carry the matter of law to the supreme court, but no provision is made for exceptions in behalf of the state, and a verdict of acquittal is beyond the reach of the appellate court.

NEW TRIAL IS NEVER GRANTED ON APPLICATION OF THE CROWN in the modern English practice in criminal cases, but only on the application of the prisoner, after a verdict of guilty.

WHEN POLITICAL POWER IS CONFERRED ON TRIBUNAL without restriction or control, such tribunal has the right to exercise it; the power of a jury in criminal cases to determine the whole matter in issue, submitted to their charge, is such a power which they may therefore lawfully and rightfully exercise.

INDICTMENT in three counts, for violations of the license law of 1846. On the trial the attorney for the prosecution introduced testimony tending to prove three distinct sales of spirituous liquors by the respondent at different times, and then offered further testimony tending to prove sales of spirituous

liquors by him at other times. To this last testimony the respondent objected, but the court admitted it. The other facts are stated in the opinion.

D. A. Smalley and W. W. Peck, for the respondent.

I. Richardson, for the prosecution.

By Court, HALL, J. This is an indictment for dealing in and the selling of distilled spirituous liquors without license, on which the respondent was found guilty in the county court, and the case is brought here by bill of exceptions.

The first objection made to the ruling of the court has been disposed of in favor of the verdict by our decision in the case of *The State v. Smith*, 22 Vt. 74, and I have nothing to say in regard to it. The other question is of much importance, and deserves serious and careful consideration.

The court, upon the request of the respondent's counsel to charge upon the point, charged the jury, in substance, that, in determining the case submitted to them, they were not the judges the law, but of the facts only; and that they were bound to consider the law as laid down by the court to be the law of the case, and were bound to be governed by it in rendering their verdict. We are now to inquire into the propriety of the charge. It is not denied by those who would sustain the charge of the court, but that the jury, in all criminal trials, have the power to disregard the law, as laid down to them by the court, and to render a verdict of not guilty contrary to it. Nor is it pretended that there is any power in the court, or any other tribunal, to set aside the verdict for any difference of opinion between the court and the jury in regard to the law, or in any manner to call the jury to account for rendering it. It is, however, insisted that the jury are nevertheless legally bound to take the law of the case from the court, and that by departing from it they would both violate a principle of law and be guilty of a moral wrong.

On the other hand, it is claimed that the power which a jury may, in such cases, exercise in rendering a general verdict, of determining the law and the facts of the case submitted to them, is a legitimate and legal power; a power which a jury, acting under their oath, and governed by a sense of duty, may rightfully and properly exercise, although it be in contradiction to the law stated to them by the court.

It must, I think, be conceded, that the opinion of the legal profession in this state, from the first organization of the gov-

ernment—certainly until a very recent period—has been almost if not quite uniform in favor of the now controverted right of the jury. From the earliest date, the supreme court, while they held jury trials in bank, were, as I have always understood, in the habit in criminal cases of charging juries, that they were rightfully the judges of the law as well as the facts; and I think the same has since been the general practice by the judges of the supreme court at *nisi prius*. The question in regard to the right of the jury was also incidentally before the supreme court in 1829, upon a charge of one of the judges at *nisi prius*, which it was contended, on the part of the respondent, was to be construed as having denied such right. It was conceded in the argument, that if the charge were liable to such construction, it could not be supported. The charge was held unobjectionable in that respect; but Prentiss, J., in delivering the opinion of the court, remarks upon the question as follows: “There is no doubt the jury are judges of the law as well as the fact. This is the true principle of the common law, and it is peculiarly applicable to a free government, where it is unquestionably both wise and fit that the people should retain in their own hands as much of the administration of justice as is consistent with the regular and orderly dispensation of it, and the security of persons and property. This power the people exercise in criminal cases, in the persons of jurors selected from among themselves from time to time as occasion may require; and while the power thus retained by them furnishes the most effectual security against the possible exercise of arbitrary power by the judges, it affords the best protection to innocence:” *State v. Wilkinson*, 2 Vt. 480 [21 Am. Dec. 560]. This opinion of a former chief justice of this state, of acknowledged legal ability and integrity, must be justly entitled to high consideration by this court.

The right as well as the power of juries in criminal trials to resolve both the law and the facts by their general verdict, was also a favorite doctrine of the early jurists and statesmen throughout the United States, and continued such (as will be shown hereafter) until the contrary doctrine was broached by Mr. Justice Story, in 1835, in the case of the *United States v. Battiste*, 2 Sumn. 240; since which time the lead of Judge Story has been followed by the supreme court of Massachusetts in the case of the *Commonwealth v. Porter*, 10 Met. 263, and perhaps by judges and elementary writers in some of the other states.

It is, however, worthy of remark, that in both the opinions

of Judge Story and of the supreme court of Massachusetts, the principal reason for the establishment and maintenance of this right of juries—the preservation of the liberty of the citizen, and the protection of innocence against the consequences of the partiality and undue bias of the judges in favor of prosecution—is wholly overlooked. Even in the labored opinion of Chief Justice Shaw, in *Porter's Case*, covering some twelve pages, it is not once even alluded to. The whole question is treated as resting on the comparative knowledge of judges and jurors in regard to the law, and in the supposed violation of the harmony of the legal system, which an admission of the right of jurors would occasion.

These matters are doubtless worthy of consideration; but that which has been disregarded appears to me to be of no less importance. Judge Blackstone, in his *Commentaries*, vol. 4, p. 349, thus speaks of trial by jury: "The antiquity and excellence of this trial for the settling of civil property has before been explained at large. And it will hold much stronger in criminal cases; since in times of difficulty and danger more is to be apprehended from the violence and partiality of judges, appointed by the crown in suits between the king and subjects, than in disputes between one individual and another to settle the metes and boundaries of private property. Our law has therefore wisely placed this strong and twofold barrier, of a presentment and trial by jury, between the liberties of the people and the prerogative of the crown." Judge Story, in his *Commentaries on the Constitution*, section 1773, says the trial by jury "was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and religious liberties, and watched with an unceasing jealousy and solicitude." And the history of English criminal jurisprudence furnishes abundant evidence, not only of the necessity of such watchfulness, but also that the power of juries to determine the law as well as the facts in criminal trials was essential to the protection of innocence and the preservation of liberty. In trials for state offenses, especially, the bias of the judges was always strongly in favor of the crown; and in most cases their partiality was such, that there was no security against the conviction of any person the government might accuse but the independence and integrity of jurors. The question of the guilt or innocence of the accused being compounded of law and fact, it was in the power of the court to shape the law to meet the proof; and if the jury would but submit to the direction of

the judges in regard to the law, there was little or no chance for the escape of the prisoner, however weak the evidence might be. Of this numerous examples might be given; but they are too well known to the readers of English history to make it necessary to specify them.

It is this supposed independence of jurors in criminal cases, that has commended the English system of jury trial to the favor and eulogium of enlightened foreigners, and has procured its introduction into some of the more liberal governments on the continent. The celebrated De Lolme, in his work on the constitution of England, which he appears to have thoroughly studied, published in 1784, holds the following language: "As the main object of the institution of the trial by jury is to guard the accused persons against all decisions whatsoever by men invested with any permanent official authority, it is not only a settled principle that the opinion which the judge delivers has no weight but such as the jury choose to give it, but their verdict must, besides, comprehend the whole matter in trial, and decide as well upon the fact as upon the point of law that may arise out of it; in other words, they must pronounce both on the commission of a certain fact, and on the reason which makes such fact to be contrary to law:" P. 175. It is obvious that the English system of jury trial would, in the estimation of this enlightened commentator, be shorn of its chief value if the right of deciding upon the criminality of the fact proved were wrested from the jurors and transferred to the judges. Without at present dwelling longer on the reasons why jurors ought to possess the right, in criminal trials, to resolve by their verdict both the law and the facts which are embraced by the issue, I proceed to inquire more directly into the actual state of the English and American law on the subject.

The origin and early history of juries is involved in some obscurity; though I apprehend there is little doubt, that at their first institution, the whole matter in controversy between the litigant parties was heard and passed upon by their peers of the vicinity, without the observance of any practical distinction between the law and the facts of the case. But when, by the progress of civilization, courts assumed a more regular form, and controversies became complicated and difficult, questions of law, by the introduction of special pleading, were withdrawn from the jury, and placed upon the record for the determination of the court. If the pleadings ended in demurrer, an issue of

law was formed for the decision of the judges; if they terminated in an issue to the country, it was to be resolved by the jury. So, also, any questions appearing upon the record on motion in arrest, or placed there by special verdict, or demurrer to evidence, or bill of exceptions under the statute of Westm. 2, c. 31, were to be adjudged by the court. The boundaries of the respective provinces of courts and juries, as well in civil as in criminal cases, were anciently marked and distinguished by the character of the questions which were thus placed upon the record. Neither branch of the triers was allowed to invade the province of the other; and the right of the jury to determine the whole issue committed to them is believed to have been as perfect as that of the judges to decide the issues that were referred to the court. The maxim, *Ad quæstionem facti non respondent judices, ad quæstionem legis non respondent juratores*, had reference to the questions which appeared upon the record; and the ancient meaning of it was, that the questions of fact thus raised should not be answered by the judges, nor the questions of law by jurors. The doctrine that questions of law, which might incidentally arise in the determination of an issue of fact, could be separated from the fact and left to the decision of the court, otherwise than by a demurrer to the evidence, or the finding of a special verdict, is of comparatively recent origin. It was unknown to the ancient common law, and has grown out of the modern practice of granting new trials for a difference of opinion between the court and jury upon questions of law arising on the trial, and is, doubtless, a legitimate consequence of the exercise of such power.

This power of granting new trials in civil actions, on the report of the judges of the proceedings at the trial, was first exercised by the court of common pleas, about the middle of the seventeenth century; previous to which time it appears to have been well understood that the jury were alone responsible for any error of law in their general verdict, and consequently had the right to determine it in conformity to their own judgment. Upon this point the historical evidence appears to be full and complete.

The first authority to which I would refer in support of this position is the statute of Westm. 2, c. 30, passed in the reign of Edward I., A. D. 1285. The statute is as follows, viz.: "The justices assigned to take assizes shall not compel the jurors to say precisely whether it be disseisin or not, so that they do show

the truth of the deed, and require aid of the justices; but if they, of their own head, are willing to say that it is disseisin or not, their verdict shall be admitted at their own peril."

The reason assigned by Lord Coke for the passage of this statute, as would naturally be inferred from its language, was, "that some justices did rule over the recognitors to give a precise verdict, without finding the special matters;" by which they were compelled, whether they were willing or not, to take upon themselves the decision of the whole issue, and were thus made liable to an attainr for a false verdict upon any point of law involved in it, when they might desire to refer such point of law to the decision of the court. For their relief against this hardship, the statute provided that they should not be compelled thus to decide the law against their will, but might, if they chose, find the facts by a special verdict, and thus place upon the record a question which should be answered by the judges: 2 Co. Inst. 422.

Lord Coke, in his commentary on this statute, says that it was in affirmance of the common law, and "that in all actions, real, personal, and mixed, and upon all issues joined, general or special, the jury might find the special matter of fact pertinent and tending only to the issue joined, and thereupon pray the action of the court for the law; and this the jurors might do at the common law, not only in cases between party and party, whereof this act putteth an example of the assize, but also in pleas of the crown at the king's suit:" 2 Co. Inst. 425; and to the same effect in *Dowman's Case*, 9 Co. 12.

If it had been supposed at the time of the passage of this act that the directions of the judges, given on the trial, in regard to the law, were binding upon the jury, and that they would have been excused from the consequences of a false verdict by following such directions, there would have been no necessity for the enactment of the statute; for the jurors would have been entirely safe in their decisions by taking care to comply with the directions of the court. But such compliance not being sufficient, it was necessary, for the security of the jury, to provide that they might, whenever they chose, put the question of law upon the record by a special verdict, to be afterwards answered by the court.

Littleton, who wrote two centuries after the statute of Westminster 2, recognizes the same right of jurors to determine the law involved in the issue tried by them by their general verdict, if they chose to do so, and points out the same relief from such

responsibility whenever they desired to shun it. In his *Tenures*, after speaking of the giving of a special verdict in an assize, he says, section 368: "In such case, where the inquest may give their verdict at large, if they will take upon themselves the knowledge of the law, they may give their verdict generally, as is put in their charge; as in the case aforesaid, they may well say the lessor did not disseise the lessee, if they will."

This right of the jury to withhold a special verdict, and to pass upon the whole matter in issue, is also fully declared by Lord Coke, a century and a half after Littleton's time. In his commentary on the foregoing section of Littleton, Coke says: "Although the jury, if they will take upon them (as Littleton here saith) the knowledge of the law, may give a general verdict, yet it is dangerous for them to do so, for if they do mistake the law, they run into the danger of an attain; therefore, to find the special matter is the safest way, where the case is doubtful:" Co. Lit. 228 b.

It seems evident from what has already been shown, that for a period of about three hundred and fifty years, which preceded the publication of Lord Coke's *Institutes* in 1628, it was well understood, that the province of the judges did not extend to the determination of legal questions, which arose incidentally out of an issue of fact, but that for their proper decision the jury were alone responsible.

The power of courts to grant new trials in civil cases, for the reason that, in their opinion, the verdict of the jury was contrary to law, not having been recognized until since the days of Lord Coke, there was not, previous to his time, any mode of relief against an erroneous verdict, except by the proceeding of attain against the jury: *Slade's Case*, Sty. 138; *Wood v. Gunston*, Id. 466. By this process, brought by the party against whom the verdict was rendered, and to which the jurors were made parties, the case was, in effect, tried over again by a jury of twenty-four, and if the verdict were found false, it was set aside and the jury punished. That this falsity might be found in the decision of the law as well as of the facts involved in their verdict, is not only necessarily implied by the language of all the authorities before quoted, but is directly affirmed by others. Thus, Chief Justice Hobart, in 1619, in *Needler v. Bishop of Winchester*, Hobart, 227, says: "It will be hard to acquit a jury that finds against the law, either common or general statute law, whereof all men are to take notice, and whereupon verdict is to be given, whether any evidence be given to them or not. As if

a feoffment or devise were made to one *in perpetuum*, and the jury should find cross either an estate for life or in fee simple, against the law, they should be subject to an attain, though no man informed them what the law was in that case." This is clearly to the point, that the jury were liable to an attain for error in deciding the law involved in their general verdict. Nor were they protected from an attain by following the instructions of the judges in regard to the law, if the instructions turned out to be erroneous. This is distinctly laid down by Chief Justice Vaughan in *Bushell's Case*, Vaugh. 145, as follows: "Finding against or following the direction of the court barely, will not bar an attain, but in some case the judge being demanded by and declaring to the jury what is the law, though he declare it erroneously and they find accordingly, this may excuse the jury from the forfeitures; for though their verdict be false, yet it is not corrupt; but the judgment is to be reversed, however, upon the attain; for a man loseth not his rights by the judge's mistake of the law." So, also, if the jury disregarded the directions of the judge, they were not liable to an attain if they determined the matter of law correctly: *Lowe v. Paramoru*, Dyer, 301 a.

But that questions of law involved in an issue of fact were not anciently treated as questions to be answered by the judges, is further shown by the fact, that bills of exceptions would not lie for misdirection of the judges to the jury in point of law, while the process of attain continued in use, and for the very reason, that the jury were responsible for the correct decision of such points of law upon that process. This fully appears from the case of *Chichester v. Philips*, Ray. T. 404, decided in 1680. In that case, which was ejectment, the defendant having introduced a will duly proved in the ecclesiastical court, and insisted that the probate was conclusive proof of its execution, the court declined so to direct the jury, but left it to them to find the fact upon that and other evidence. The jury having found against the will, and a bill of exceptions being allowed, a writ of error was brought in the king's bench, when the judgment below was affirmed—not because the court had instructed the jury correctly, but, in the language of the reporter, "because, though the evidence be conclusive, yet the jury may hazard an attain, if they will." See also *Philips v. Chichester*, T. Jones, 146; Bull. N. P. 316.

There would then seem to be no doubt that it was anciently admitted to be the proper province of the jury, in civil cases, to

decide in conformity to their own judgment all questions, whether of law or fact, which were embraced in the issue committed to their charge. And this result of the authorities necessarily disposes of the argument against the right of juries drawn from the maxim, *Ad quæstionem facti non respondent judices, ad quæstionem legis non respondent juratores*, inasmuch as it shows that the maxim must have been understood to have reference alone to the questions, either of law or fact, as they stood upon the record.

The jurors, being anciently under no legal responsibility to the judges for the correctness of their decisions, either of the law or the facts of the case, might properly exercise their own discretion in their determination. But since motions for new trials and bills of exceptions have been substituted for the process of attain, and courts have come to set aside verdicts, because the jury disregard the opinion of the judge upon questions of law embraced by the issue, and for misdirection of the judge, juries have been placed in a new relation to the judges. The court, by the modern practice, having power to revise the decisions of juries, and to order new trials for their neglect to follow the directions of the judge upon matters of law, it has consequently become their legal duty to comply with such directions. And the court, and not the jury, may now be properly considered as the judges of the law involved in an issue of fact in civil cases, though it was formerly otherwise.

Having shown that it was the proper province of the jury, by the ancient common law, to determine, according to their own judgment, the whole issue committed to their charge in civil cases, it can not well be contended that their authority could be less extensive in criminal trials. Indeed, if the common law had originally limited the power of juries in civil suits to the decision of the facts, and had placed them under the direction of the court in regard to the law connected with the facts, it might still be claimed with entire confidence that no such limitation had been imposed in prosecutions for crimes.

There are several important distinctions between civil actions and criminal prosecutions, which indicate very decisively that whatever our English ancestors might have considered the power of judges over questions of law embraced in the issue to the jury in the former, they must have contemplated their entire independence of the judges in the latter.

In the first place, there is a marked and important distinction between prosecutions for crimes and civil suits, in the authority

by which they might be instituted. Any subject was at full liberty, at his own pleasure, to commence his action against a party who he conceived had injured him in his person or property, and might freely prosecute his suit to final judgment and execution. But the king, with the aid of all the judges in the realm, could not put an individual on trial for a capital offense without first obtaining the consent of the people of the county assembled to pass upon the case as a grand jury. And if, previous to their investigation of the case, the supposed offender had been arrested or committed to jail, their refusal to countenance the prosecution would at once release him from imprisonment. After providing so fully for the consent of the peers of the subject to the very institution of a criminal prosecution against him, it can not well be conceived that the jealous framers of the common law would have immediately withdrawn its protection from him and transferred the power of determining his guilt or innocence to the servants to the crown. It may be here remarked, that this restriction on the very commencement of a criminal prosecution has been deemed so essential to the liberty of the citizen in this country, that a provision has been incorporated into the constitution of the United States, and into the constitutions of most of the individual states, "that no person shall be held to answer for a capital or otherwise infamous crime, but upon the presentment of a grand jury."

Again, the rules of pleading, which were anciently adopted, were designed to separate the law from the facts, wherever it was deemed practicable, for the purpose of submitting the former to the judgment of the court and leaving the latter to the determination of the jury. In civil actions, if the defendant could not deny the facts on which the suit was founded, he was obliged to place his defense upon the record by special plea, which pleading usually ended in demurrer, forming an issue of law for the decision of the court. If the defendant in such case pleaded the general issue, the court would at once exclude his evidence, so that no power whatever was given to the jury to pass upon his defense. Under the ancient practice, in the old actions of debt, detinue, covenant, trespass, and replevin, a large portion of the questions arising in litigated suits were thus withdrawn from the action of the jury and submitted to the determination of the judges. But in criminal prosecutions the accused was never compelled to take his defense from the jury and submit it to the court by special justification, but might always put himself on the country for his general deliverance.

It will be difficult, I think, to find a reason why the rules of pleading, which were adopted in civil actions, were not extended to criminal prosecutions, unless it be in the design of the founders of the common law, that the right of passing upon the criminality of the fact, as well as upon the fact itself, involved in the general plea of not guilty, should, for the safety of the subject, be withheld from the judges for the determination of the jury.

In the third place, the contrast between civil actions and prosecutions for crimes is most distinct and striking in the conclusive operation of the verdict in criminal cases. However the court may disapprove of a verdict of acquittal, they have no power, as in civil suits, to award a new trial. The security of the jury from all consequences in giving it is also full and complete. No earthly tribunal can revise their verdict, or call them to account for rendering it.

That, after a verdict of not guilty in a criminal proceeding, there exists no power to put the party again on trial for the same offense, is a doctrine too well understood to require to be sustained by authorities... The jury are also exempt from all questions in regard to its propriety. The process of attain, the remedy for a false verdict in civil cases, was never extended to verdicts in prosecutions for crimes. This, though there are some *dicta* to the contrary, was admitted to be the law by Lord Mansfield at the hearing of the *Dean of St. Asaph's Case*, and is indeed established by authority beyond doubt or question: *Bushell's Case*, Vaugh. 146; *Trials per Pais*, 274; 1 Ch. Crim. L. 529, and cases there cited.

That attempts were made from time to time, and at various periods, by English judges, to encroach upon the rights of jurors to determine, in criminal proceedings, the whole issue committed to their charge, is undoubtedly true. The attempts were, however, resisted, and the contest carried on by the judges on the one side and the people on the other constitutes a part, and not an unimportant one, of the great struggle between the prerogative of the crown and the freedom of the subject, which was protracted for so long a period in England, and which eventually terminated in the practical triumph of the latter.

Some notice of the most prominent efforts of English judges to coerce and control the verdicts of jurors in criminal trials, and of the manner in which they were resisted, will perhaps serve to throw some light on the question involved in the pres-

ent case. The first attempts to compel jurors to give verdicts in conformity to the wishes of the judges were by fining and imprisoning them.

In 1554 Sir Nicholas Throckmorton was tried for high treason before a court of high commission, Bromley, chief justice of England, presiding, and found not guilty, against the charge of the court. Before the jury separated they were sent by the chief justice to prison, where they remained several months, when they were released, upon the payment of enormous fines, by which most of them were ruined: *Throckmorton's Case*, 1 Howell's State Trials, 901. In the despotic reign of Philip and Mary, there could be no redress for this arbitrary act of oppression.

In the time of Elizabeth, A. D. 1602, there appears to have been another instance of a jury being fined and imprisoned for giving a verdict of not guilty on an indictment of murder, against the charge of the court; and so far as anything is known, the injury remained without redress: *Wharton's Case*, Yelv. 24.

During the succeeding reigns of James I. and Charles I., the court of star-chamber, which consisted of privy councilors, with two common-law judges, was in active operation, and drew within its jurisdiction complaints for libels and sedition, and all offenses against the government which were not punishable capitally. By the imposition of enormous fines and the infliction of barbarous and ignominious punishments, through the instrumentality of this court, the crown was generally enabled to disgrace and ruin whoever it chose to assail, without calling upon jurors in the common law courts to aid, by their verdicts, in bringing them to the block or the gallows. But when that arbitrary and odious tribunal was, in 1641, abolished by the long parliament, it became necessary for the government to resort again to the ordinary tribunals for the punishment of crimes, either real or pretended.

The rights of juries had by this time come to be pretty well understood, though they were not yet fully acknowledged by the ruling authority, whether it might be king or commonwealth.

In 1649, a few months after the execution of King Charles, Lieutenant Colonel Lilburne was indicted for high treason against "the government, by parliament, without king or house of lords;" and on his trial he argued to the jury, and read from Lord Coke's Institutes, to show that they were the judges of the law as well as the fact, and the jury acquitted him against the charge of all the judges, who were clear for a conviction. The

parliament, having failed to convict, passed a special act banishing him by name, and declaring that his return to England should be deemed felony, for which he should, on conviction, suffer death. He did return, and in 1653 was tried at the Old Bailey for felony, against the act by which he had been banished. A copy of the act of parliament, duly certified, was produced, and Lilburne, who was in court, was fully proved to be the person named in it. The jury, however, against the charge of the court, held the act under which he was prosecuted to be illegal, and found him not guilty. They were afterwards severally called before the counsel of state, and questioned in regard to their verdict, and their answers indicate a decided and manly determination to maintain their independence as jurors and freemen. The answer of one of them, as entered on the minutes of the council, will serve as a specimen of the whole. It is as follows: "Michael Rayner being asked whether Mr. Scobel, clerk of the house, did not give evidence that Lieutenant Colonel John Lilburne, at the bar, was the very Lilburne against whom the act was made, he said he did give that evidence, and that he did believe he said true, and that the copy of the act of parliament produced was a true copy." But saith, "that he and the rest of the jury took themselves to be judges of matter of law as well as of matter of fact; although he confessed that the bench did say they were only judges of the fact:" 2 Hargrave's State Trials, 79, 80.

In the reign of Charles II., Kelynge, chief justice of the king's bench, a pliant instrument of the crown, fined Sir Henry Wyndham and eleven others of a grand jury because they would not find a bill of indictment for murder, telling them that, the man having died at the hand of the party, it was their duty to find the bill, it being matter of law for the court whether it was murder or in self-defense. He also fined a petit jury, who refused to convict a party on an indictment under the conventicle act, and the next year imposed a fine upon another jury, who declined to follow his directions upon a matter of law. His own account of the latter case, as given in his reports, page 50, is as follows:

"Hood was indicted for the murder of Newman, and upon the evidence it appeared that he killed him without any provocation, and thereupon I [Kelynge] directed the jury that it was murder, for the law in that case intended malice, and I told them they were the judges of the matter of fact, namely, whether Newman died by the hand of Hood; but whether it was murder

or manslaughter, that was matter of law, in which they were to observe the directions of the court. But notwithstanding they would find it only manslaughter; whereupon I took the verdict, and fined the jury, of which John Goldwier was foreman, five pounds apiece."

These illegal acts of the chief justice having, in December, 1667, been brought to the notice of parliament, witnesses were examined, and he was heard in his defense, and the grand committee of justice reported to the house of commons, that the proceedings of the lord chief justice in these cases were "innovations in the trial of men for their lives and liberties, and that he had used an arbitrary and illegal power, which was of dangerous consequence to the lives and liberties of the people of England." The committee also recommended that "the lord chief justice be brought to trial, in order to condign punishment, in such manner as the house should judge most fit and requisite." But he, having petitioned to be heard at the bar of the house, and there making an abject submission, the matter, by the intercession of his friends, was suffered to drop without being further prosecuted: *Penn and Mead's Trial*, 6 Howell's State Trials, 992; *Bushell's Case*, Id. 1019.

Only one other attempt to control the decisions of jurors by punishing them for unsatisfactory verdicts will be mentioned. In 1670, the famous William Penn, together with William Mead, were tried at the Old Bailey before a court of oyer and terminer, the recorder of London presiding, for a breach of the peace, in being concerned in a tumultuous and unlawful assembly. The proof was, that some two or three hundred persons had peaceably and quietly met in Grace street, London, and listened to the preaching of Penn. Penn contended that there had been no breach of the peace; that the assembly was lawful; and he read from Lord Coke to the jury in support of his position. The court charged strongly and bitterly against the prisoners; but the jury disregarded the charge and returned a verdict of not guilty. There were no disputed facts, and there can be no doubt the jury decided the law correctly. The court, however, were in great fury with the jury, and immediately fined them forty marks each, and committed them to Newgate. Edward Bushell, one of the jurors, with a similar resolution to that of John Hampden in regard to the ship-money, refused to obtain his release by paying his fine, and brought his writ of *habeas corpus* to the court of common pleas. It being returned

upon the writ, that, being one of the jury, Bushell had acquitted Penn and Mead against evidence, and also "contrary to the direction of the court in matter of law," the question of the power of the court to control their verdict upon the matter of law was distinctly raised. The case was argued before eleven of the twelve judges, and their judgment was delivered by Chief Justice Vaughan, denying any such power of control in the court, and vindicating the right of the jury to determine both the law and the fact by their general verdict; and Bushell was thereupon discharged: *Bushell's Case*, Vaugh. 135-158.

I am not aware, that the independence of juries thus sanctioned by the judgment in *Bushell's Case*, has ever since been practically invaded, except in prosecutions for libel. Even in that class of prosecutions, the whole question of the guilt or innocence of the accused appears to have been submitted to the jury for a period of over fifty years after that decision. Among the instances in which this was done, was the trial of Thompson, in 1682; of the seven bishops, in 1688; and of Tutchin, before Chief Justice Holt, in 1704. But during the reign of George II., it began to be argued by some of the judges at *nisi prius*, that whenever the law could by any means be separated from the facts, in criminal trials, it should be determined by the court; that it could be thus separated in prosecutions for libels, because the libel was set forth in the information; and whether the matter charged to have been published was really libelous or not, was matter of law for the determination of the court. It was accordingly held, that the only questions to be submitted to the jury were the fact of publication, and the truth of the innuendoes set forth in the information. Upon proof of these, the jury were required to render a verdict of guilty; leaving the question whether the publication was a crime or not for the subsequent decision of the court: 2 Starkie on Slander, c. 16.

This doctrine, which withdrew from the jury the whole question of the criminality of the publication, if it could have been firmly established, would have placed in the hands of the judges substantially the same power over political discussions that had been so odiously exercised by the long-suppressed court of star-chamber. It was adopted by Lord Mansfield soon after he took his seat on the king's bench, and was followed by him in the trials of Woodfall and others; by Mr. Justice Buller in the *Dean of St. Asaph's Case*; and on a motion for a new trial in the

latter case, it was, in 1785, declared to be the law, by the unanimous decision of the king's bench: *Rex v. Dean of St. Asaph*, 3 T. R. 429.

This doctrine of the king's bench did not, however, meet the approbation of all the judges in Westminster hall, and it was earnestly and vehemently opposed by most of the leading members of the profession, who, when employed for defendants, appealed from the judge to the jury in regard to their constitutional rights, and in many instances were successful in cases where, if the whole matter had been left to the jury, verdicts of guilty would probably have been obtained. This struggle against the alleged judicial invasion of the independence of juries continued from the time of Woodfall's trial, in 1770, till 1792, when the nation being thoroughly roused, the subject was taken up in parliament, and Mr. Fox's famous libel act passed, by which trials for libels were placed upon a like footing with other criminal prosecutions. Parliament refused to recognize the decision of the king's bench as ever having been the law of the land, the preamble of the act declaring, that "whereas doubts have arisen" as to the competency of jurors in prosecutions for libels "to give their verdict upon the whole matter in issue," therefore, it was enacted that the jury might give such verdict, etc.

This controversy in regard to the rights of jurors was the occasion of the well-known attack of Junius upon Lord Mansfield, which, so far as it imputed corrupt motives to that distinguished and venerated magistrate, was unquestionably unfounded and unjust. Lord Mansfield was doubtless sincere in the belief that such a doctrine, which had been acted upon by other judges previous to his time, was essential to the preservation of order and good government against sedition and licentiousness. It is difficult, however, to free him from the suspicion of partiality of feeling in this matter. He appears to have been a member of the cabinet when the prosecutions for libels against Wilkes, and also that against Woodfall, which he afterwards tried, were resolved upon, though it can not well be supposed he would have participated in the deliberations in regard to them. After he ceased to be a member of the cabinet council, he long exerted great influence with the ministry, and was relied upon by them to defend their measures in the house of lords, which he often did with consummate skill and ability. Unless he is to be considered as exalted entirely above the common frailties of human nature, it is scarcely conceivable that he could have been entirely

impartial in prosecutions instituted and maintained by an administration with which he was so intimately connected. He would seem, indeed, to have been one of that very class of judges against the effects of whose bias in favor of the government the independence of jurors in matters of law as well as of fact was originally designed to guard.

It may be added that, though the opinion of Lord Mansfield, in the *Dean of St. Asaph's Case*, is ingenious and able, as is everything that emanated from his powerful mind, yet it is nevertheless unsatisfactory. The intention with which the act is done must be an ingredient of every crime, and is necessarily a question of fact. By the rule adopted by the king's bench, it is manifest that the question of intent was withdrawn from the jury and transferred to the court. To this extent, at least, the decision can not be sustained by argument. The libel act eventually passed the house of commons without a division, and met with but a feeble opposition in the house of lords. It was advocated in both houses on the ground that juries, in criminal trials, had the constitutional right to pass upon the whole issue, the law as well as the facts, and that this right, having been improperly invaded, ought to be restored to its former footing: 29 Parl. Hist. 577, 741, 1404. Mr. Worthington, in his treatise on the power of juries, although he endeavors to maintain the general authority of judges to direct them in matters of law, admits that in cases of libel, "the extraordinary right to decide the law has been by the legislature expressly committed to juries:" P. 196. Now, the language in which this right has thus been, as Mr. Worthington says, expressly committed to juries, is found in the first section of the act, and is simply, "that the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue." It is undoubtedly true, that this does admit the right in the jury to decide the law as well as the fact involved in the issue; but it is precisely the same authority that has always belonged to jurors in all other criminal trials, and has been exercised without question or objection ever since the judgment in *Bushell's Case*, Vaugh. 135. How the permission given to the jury in the libel act to pass upon the whole matter in issue can confer the power to judge of the law embraced in it, and the same permission which has always been given by the common law can be construed to withhold it, is to me incomprehensible. I apprehend the same authority to decide upon all matters in the issue exists in both cases.

In this country the decisions of judges and the opinions of

jurists and statesmen have been, until a very recent period, quite uniform in favor of the independence of juries in criminal trials.

On the trial of Henfield, for illegal privateering, before Judges Wilson and Iredell, of the United States supreme court at Philadelphia, in 1793, Judge Wilson charged the jury, that they, in their general verdict, must decide both the law and the facts: Wharton's State Trials, 88. Judge Wilson had, previously, in a course of law lectures, delivered in the College of Philadelphia, maintained, by argument and authority, this right of juries in all criminal trials: 2 Wilson's Works, 366-375. The sedition act of 1798 furnishes the very strongest evidence of the sense of the profession, as well as of the people of this country at that time, upon this question. That act prescribed a punishment for libels on the government of the United States and its officers, and after providing that the accused might give the truth of the libel in evidence, declared, that "the jury who should try the cause should have a right to determine the law and the fact, as in other cases;" the words "as in other cases" being a direct reference to a right, the existence of which was understood to be sufficiently well known to form a general rule of action.

Judge Chase, of the United States supreme court, on the trial of Fries for treason in May, 1800, charged the jury that "it was the duty of the court, in that and all criminal cases, to state to the jury their opinion of the law arising on the facts; but that the jury were to decide, in that and in all criminal cases, both the law and the facts, on their consideration of the whole case:" Chase's Trials, by Evans, App. 12, 45. This opinion of Judge Chase is entitled to the more weight, from his well-known bias in favor of the government in state prosecutions, for the undue manifestation of which bias on this very trial he was afterwards impeached before the senate. On the trial of the impeachment, which took place in 1804, Mr. Tilghman, an eminent attorney of Pennsylvania, testified on being inquired of, "that the usual practice in the courts in which he had been, was for the court to permit the counsel on both sides to argue the law to the jury at length," and after they finished, for the court to charge, and that "they generally informed them what, in the opinion of the court, was the law, but that the jury were the judges of the law and the fact:" Id., 27. And this right of the jury, though the question in regard to it did not directly arise on the trial of the impeachment, appears to have been generally understood by the managers and counsel to be the settled law: Id., 101, 109, 182, 242, 247.

On the trial of William S. Smith, before the district court of the United States, at New York, in 1806, for being concerned in a military enterprise against the Spanish-American provinces, Judge Talmadge charged the jury that it was a well-settled rule of law that the right appertained to them to decide the law as well as the facts in criminal prosecutions, "but that the jury were not, therefore, above the law; and that, in executing the right, they attached to themselves the character of judges, and as such were as much bound by the rules of legal decision as those who presided over the bench:" *Trial of Smith and Ogden*, 236.

On the trial of Wilson and Porter, in 1830, for robbing the mail, Judge Baldwin, of the supreme court of the United States, after stating to the jury what he conceived the law applicable to the case to be, addressed them as follows: "We have stated to you the law of this case, under the solemn duties and obligations imposed on us, under the clear conviction that in doing so we have presented to you the true test by which you will apply the evidence to the case; but you will distinctly understand that you are the judges both of the law and the fact in a criminal case, and are not bound by the opinion of the court; you may judge for yourselves, and if you should feel it your duty to differ from us, you must find your verdict accordingly:" *United States v. Wilson and Porter*, Baldw. 99.

In the state of New York, in 1804, in the case of *The People v. Croswell*, 1 Cai. 149, for a libel on President Jefferson, the supreme court was equally divided upon the question whether the intent of the respondent in making the publication ought to have been submitted to the jury; Judges Lewis and Livingston holding to the doctrine of Lord Mansfield, in the *Dean of St. Asaph's Case*, and Judges Kent and Thompson being of opinion that the whole issue was for the jury. The attention of the legislature of the state being thus called to the subject, an act was passed in 1805, which, after reciting that doubts had arisen whether, in prosecutions for libel, the jury had a right to give their verdict on the whole matter in issue, declares that "in any such indictment or information the jury who shall try the same shall have a right to determine the law and the fact under the direction of the court, in like manner as in other criminal cases;" thus, equally as in the case of the sedition act, furnishing most conclusive evidence that the general right of the juries to judge of both law and facts was understood to be settled and established.

So important was the independence of juries in trials for

liberals deemed to be, that the provisions of the act of 1805 were substantially incorporated into the amended constitution of the state in 1821; and similar provisions implying the existence of the right of the jury to determine the law and the facts, in all criminal trials, will be found in the constitutions of many, probably of a majority, of the states of the Union. Indeed, the opposition to this generally approved doctrine seems to have been so isolated and inconsiderable in this country as scarcely to have attracted attention until it was brought into notice by Judge Story, in 1835, in the case of *Battiste*, before mentioned. The following state authorities are also in favor of the now controverted rights of juries: *State v. Snow*, 18 Me. 346; 2 Swift's Dig. 174; 1 Wheeler's Crim. Rec, 108, 269; *Doss v. Commonwealth*, 1 Gratt. 557; *State v. Allen*, 1 McCord, 525 [10 Am. Dec. 687]; *Holder v. State*, 5 Ga. 441; *State v. Jones*, 5 Ala. 666; *Armstrong v. State*, 4 Blackf. 247, overruling *Townsend v. State*, 2 Id. 151; *Patterson v. State*, 7 Ark. 59 [44 Am. Dec. 630].

In Massachusetts, as well as in other states, the early doctrine appears to have been favorable to the independence of juries in all criminal trials; and so late as 1830, in the trial of *Knapp*, *Commonwealth v. Knapp*, 10 Pick. 497 [20 Am. Dec. 534], for murder, the supreme court of that state, sitting in bank, acknowledged and declared the right of the jury to determine the law as well as the facts by their general verdict; and in 1837, in the case of the *Commonwealth v. Kneeland*, 20 Id. 206, the same doctrine seems to be admitted. But in the case of *Commonwealth v. Porter*, 10 Met. 263, decided by the supreme court in 1845, the previous cases on that subject were disregarded, and the right of the jury to differ from the court in relation to the law, in making up their verdict, is denied. The court, however, seem to shrink from the consequences of their decision; for it is a singular feature of the case, that although the court held that the jury must be absolutely governed by the law as laid down by the court, yet the verdict was nevertheless set aside, because the judge who tried the case refused to allow the counsel for the accused to argue the law to the jury. It would, therefore, now seem to be the law of Massachusetts, that it is an acknowledged right of the respondent's counsel to read his authorities, and argue the law fully to the jury; yet that, if the jury pay the slightest regard to the authorities or argument, they violate a settled principle of law, and are perhaps guilty of official perjury. I can not but think that

upon one or the other of these points, the supreme court of Massachusetts must be in error.

The right of juries is also either qualified or denied in *Montgomery v. State*, 11 Ohio, 427; *Pierce v. State*, 13 N. H. 536; *Montee v. Commonwealth*, 3 J. J. Marsh. 149; *Thomson v. State*, 2 Blackf. 151, since overruled as before stated.

I will now proceed to notice some objections that have been made to the doctrine maintained in this opinion.

The opinion of Chief Justice Best, in *Levi v. Milne*, 4 Bing. 195, was relied upon by the counsel for the state, to show that even in England the libel act has not been considered as conferring authority on the jury to determine the law involved in the issue of not guilty. Such appears to have been the language of that judge, not only in that case, but in the previous case of *Rex v. Burdett*, 4 Barn. & Ald. 95; S. C., 6 Eng. Com. L. 404. But in *Rex v. Burdett*, Chief Justice Abbott differed with him, and declared as his opinion, "that the jury were at liberty to exercise their own judgments upon the whole matter in issue, after receiving the opinion and declaration of the judge." Since the case of *Levi v. Milne*, the subject has undergone considerable discussion in England; and it appears now to be settled, against the opinion of Chief Justice Best, that the whole matter of the issue is for the jury. It is now held, that the judge is not bound to give his opinion to the jury, whether the publication be a libel or not, and that the whole question of libel or no libel is for their determination: *Fairman v. Ives*, 5 Barn. & Ald. 642; S. C., 7 Eng. Com. L. 220; *Baylis v. Lawrence*, 11 Ad. & El. 920; S. C., 39 Eng. Com. L. 270.

Mr. Worthington, in his work on the power of juries, refers to a few ancient authorities in support of the idea of there having formerly been a controlling power in the judges over the points of law embraced in the issue to the jury; none of which will, however, on examination, be found to sustain that position. Thus he says "it is most unequivocally declared by Glanville, that the assize could not decide upon the law connected with disseisin." And hence he would have it understood that the statute of Westminster 2 did not mean, as its language imports, that the jury might decide upon the question of disseisin by their general verdict. But the case put in Glanville, lib. 2, c. 6, by Mr. Worthington's own showing, was one in which the pleadings, which were then *ore tenus*, ended in an issue of law, and because it had thus become an issue of law

on the record, the trial was withdrawn from the assize and transferred to the court: Worthington, 118.

He also relies upon three cases in Plowden's reports, viz.: *Townsend's Case*, Plowd. 111; *Willion v. Berkley*, Id. 223; and *Grendon v. Bishop of Lincoln*, Id. 493. In the first case, the jury found a special verdict, stating the facts at large, and then added their own conclusion in regard to the law. The very object of a special verdict being to submit the question of law to the court, it was very properly held, that the jury had exceeded their authority, and the court adopted their own conclusion upon the facts found. In the next case, one of the parties, in order to get his case to a jury, undertook to traverse a matter of law; but the court, in the language of Plowden, held, "that if the parties are agreed upon the matter of fact, they shall not traverse the law thereupon, as to say, the law upon this matter is with me, without that, that it is with you; but the judges shall adjudge upon it without traverse of the party." And the third case is to the same effect, that a party could not traverse matter of law, because that was to be decided by the court: Worthington, 119-124. In these several cases the province of the court to determine questions of law is very properly insisted on; but in none of them is there any intimation that the court could determine any question of law which arose out of the issue on a jury trial. Indeed, the most thorough research in favor of the restricted right of juries has not brought to light a single ancient authority which countenances the existence of such a power in the court, even in civil cases, while the remedy for a false verdict by attainst was in use; nor a single authority which contravenes in the slightest degree the doctrine laid down by the plain language of the statute of Westminster 2, of Littleton, and of Coke, that the jury, by a general verdict, decide upon the law as well as the fact included in the issue. While, on the other hand, the doctrine of the statute, sanctioned by those venerated expounders of the ancient law, has been shown to be in accordance with contemporaneous decisions and practice. It may not be wholly out of place to add, that this view of the right of jurors is sustained by the learned Mr. Hargrave, in his commentary upon the maxim, *Ad quæstionem*, etc., in Coke's Institutes, and also by Mr. Chitty, in his approved treatise on criminal law: Co. Lit. 155, note 276; 1 Ch. Crim. L. 637.

It has been claimed, that the allowance of bills of exceptions in criminal cases is inconsistent with a right of the jury to pass upon the whole matter in the issue tried by them. It is doubt-

less true, that the doctrine of bills of exceptions proceeds upon the presumption that the directions of the judge in matters of law are followed by the jury to the extent to which such directions are made subject to the revision of the court; and to that extent the law involved in such issue may be conceded to be under the control of the court. But the limited extent to which the remedy may be applied furnishes an argument in favor of rather than against the controverted right of juries.

Bills of exceptions were unknown to the common law, and in England were authorized by the statute of Westm. 2, c. 31, which has been uniformly held to apply only to civil suits. Neither in England nor in the federal courts of the United States was there ever any remedy by bill of exceptions in criminal cases: 1 Ch. Crim. L. 622; *United States v. Gibert*, 2 Sumn. 19. The remedy, wherever it exists, is founded on the local statutes of the several states. In this state the accused party, in case a verdict of guilty is returned against him, may file exceptions to any decision or ruling of the judge upon the trial, and carry the matter of law to the supreme court. But no provision is made for exceptions in behalf of the state, and a verdict of acquittal is beyond their reach.

It is most obvious that this remedy does not deprive the accused of any privileges which he had before enjoyed, but was designed to furnish him with a new and additional security against the danger of an illegal conviction. To the protection which the common law had provided, that before the accused should be subjected to punishment for a crime there should be a verdict of his equals that in fact and in law he had been guilty of it, the statute superadded the further security that the decision of the jury against him should not have been induced by such action or advice of the court as, in the opinion of the superior tribunal, was contrary to law. The effect of the remedy is, not to deprive the jury of the right in favor of the prisoner of determining the law, but to render a concurrence in opinion of both the court and the jury, in regard to the law, necessary to his conviction and punishment.

The modern practice in England of granting new trials in cases of misdemeanors, where, in the opinion of the judges, the verdict is against law, produces the same effect as our bills of exceptions. A new trial is never granted on application of the crown, but only on that of the prisoner, after a verdict of guilty. It furnishes the accused with an additional shield for his defense, but takes from him no previous right. Both bills of ex-

ceptions and new trials are similar in their operation to a motion in arrest of judgment. They are all applied after a verdict of guilty by the jury, and all operate as additional securities against his illegal and improper punishment.

When the legislature of a state shall become bold enough to provide by law that exceptions may be filed in behalf of the prosecution and a verdict of acquittal set aside and a second trial awarded, for the reason that the jury disregarded the instructions of the judge upon the matter of law, then, and not till then, can an argument be raised from the law of exceptions against the right of juries in favor of the prisoner to determine both the law and the fact involved in the issue.

The alleged unfitness of jurors to decide questions of law has been urged as an argument against their legal right to make such decisions; and though the argument must necessarily be inconclusive, it may nevertheless be proper to notice it. It is undoubtedly true, that judges are presumed to be possessed of legal learning greatly superior to that of jurors, and in that respect to be much more competent to decide legal questions. It is to be noticed, however, that the question involved in an issue of not guilty of a crime are seldom, if ever, of a complicated or difficult character. They relate to the sufficiency of the evidence to constitute the crime charged in the indictment; as whether the proof is sufficient to show that the party accused has committed the crime of murder, of manslaughter, of theft, of perjury, of arson, etc.; which questions, with the aid of the arguments of opposing counsel, a jury, even without the advice of the court, would ordinarily have little difficulty in determining rightly. But experience proves that juries habitually show a respectful deference to the advice of judges upon points of law arising on a trial, and that the examples of their resisting such advice are not of common occurrence. And when such instances happen, they are not always from the fault of the jury. Indeed, if a judge conducts a trial in a fair and impartial manner, and paying a just regard to the rights of the jury, advises them intelligibly and correctly upon the matter of law, he will seldom find occasion to complain of their disregarding his counsel.

But freedom from partiality and undue bias is essential to the just decision of legal questions as well as law learning; and though jurors might, from want of legal information, sometimes improperly acquit a guilty party, yet such acquittal would be a much less evil than the conviction by a partial judge of one who was innocent. The decisions of successive juries are not likely

to be wrong, except in occasional instances; while one decision of a court, forming a precedent for another, would, if erroneous, produce a continuance in error. In this respect the danger in criminal prosecutions would be greater from trusting too much to the judge than to the jury. The objection to the fitness of jurors to decide questions of law was as forcibly stated by Lord Mansfield in the *Dean of St. Asaph's Case* as it has been since, or perhaps ever can be. His argument, however, failed to convince the nation of the correctness of his decision excluding the law of libel from the consideration of the jury. The nation, by their representatives, gave full evidence that they preferred the security furnished to the liberty of the subject by the right of the jury to judge of the law in each individual case—imperfect as their judgment might be—to the dangerous uniformity and harmony of successive convictions registered by order of the judges.

Notwithstanding the extended consideration which I have deemed it proper to give the question of the right of juries to determine the whole issue in criminal prosecutions, I think the right may be successfully maintained on much narrower grounds.

The power of juries to decide the law as well as the fact involved in the issue of not guilty, and without legal responsibility to any other tribunal for their decision, is universally conceded. In my opinion, such power is equivalent to right.

Lord Mansfield, perceiving the want of all power to control the decision of the jury, admits, in the *Dean of St. Asaph's Case*, that the distinctive province of the court over the law involved in an issue to the country can only be preserved by the honesty of the jury; and Mr. Justice Ashurst compares the power of the jury to pass upon the law in such case to that of a man with a pistol at your head, who has the power to take away your life, though not the right. That there is a distinction in morals between power and right is undoubtedly true, and such distinction may not be inaptly illustrated in the case supposed. But this distinction has no application to questions of political power. Where the political power which rests in a state is distributed by the constitution or laws among the different officers or departments of the government, the very distribution or assignment of the power implies that it may be lawfully and rightfully exercised. Indeed, the very object of conferring the power is that it may be thus exercised.

The king, by the unwritten constitution of England, has the sole power of declaring war. This power, though not founded

on any statute, has existed for ages; and though sometimes complained of, has never been declared illegal. It will not be denied that this power in the king is a legal right; and yet the only evidence that it is so is to be found in the continued existence of the power without authority in any other branch of the government to interfere with its exercise. The power of the jury is of the same character.

Why should the right accompany the power in the one case and not in the other? The reason given, why the power of the jury can not be considered as a right, is their unfitness for its proper exercise. This, however, is matter of opinion. The unfitness of the king for the exercise of the war power might appear equally strong to many minds, and might be urged with much force against the propriety of his being allowed to exert it. I apprehend Lord Mansfield would not have listened very patiently to such an argument against the constitutional right of the king to declare war; and yet, it is the very argument by which he would convert the exercise of a power of the jury, which has existed from time immemorial, into a wrong. In both cases the argument, from unfitness, rests on assumptions which, if they were true, might furnish good reasons for withdrawing the power altogether; but the fact that the power has been suffered to continue for ages without having been withdrawn ought to be conclusive evidence that it was allowed to remain for the purpose of being exercised.

If the power of determining the whole issue in a criminal prosecution, upon a plea of not guilty, had been expressly conferred on the jury by statute, and the court, by the same statute, had been prohibited from questioning in any manner the propriety of the verdict, it would scarcely be pretended, that the statute did not confer on them the right as well as the power. Such we have already seen is the admitted effect of the English libel act. And is not the power equally a right, which has to the same extent been exercised for centuries by the authority of the common law, and which power, though sometimes questioned, has always been vindicated and maintained?

This power of a jury is doubtless liable to abuse; and so is the power conferred on a court, or on any other human tribunal. But while a jury or court keep within their proper sphere of jurisdiction, they are in the exercise of the powers conferred on them, and are in the performance of a legal right; and this, though they may by the abuse of the power be guilty of a moral wrong. The extent of the jurisdiction of a court or jury is

measured by what they may or may not decide with legal effect, and not by the correctness or error of their decision. Thus the butcher Jeffreys, by virtue of his office as judge, had the political power, and consequently the legal right, to conduct the trial of Algernon Sidney, and to give his opinion upon the law of the case in his charge to the jury, though for his shameful abuse of the right he may have incurred the deepest moral guilt. So the jury in a criminal trial have the legal right to decide the law as well as the fact involved in the issue; but this does not give them a right, by a wanton disregard of law, to decide arbitrarily. They are as much bound to exercise their best judgment and discretion in determining the law as a court is; and they are held by an equally strong obligation to do so. The oath which is administered to them, "that they will truly try and true deliverance make between the state and the prisoner at the bar, according to the evidence given them in court, and the laws of the state," embraces the whole matter in issue, and binds them equally with the judges to perform their duty faithfully and conscientiously.

I conclude, then, that when political power is conferred on a tribunal without restriction or control, it may be lawfully exerted; that the power of a jury, in criminal cases, to determine the whole matter in issue committed to their charge is such a power, and may therefore be lawfully and rightfully exercised; in short, that such a power is equivalent to, or rather is itself, a legal right.

I am aware that the causes which in England rendered the establishment of this right of juries indispensable to individual safety, if they now exist in this country, must be conceded to operate with comparatively slight force. It may be that there is not in this state at present any undue bias in the court in favor of the government, in criminal prosecutions. But of this it does not, perhaps, become the judges to speak. It may be that there is no just cause for the apprehension of such an evil in future. If, however, it be wise and expedient to declare that there shall no longer be any check to the possible exercise of this undue bias by the judges, it should be done by legislative determination, not judicial decision. If the legislature desire that juries should hereafter take the law, in criminal trials, from the court, they can readily say so, and prescribe a mode for carrying their will into effect. Until they do so, I shall be disposed to abide by the law as it has come down to us from our ancestors.

There being error in the charge of the county court to the jury, the verdict is set aside, and a new trial granted.

BENNETT, J., delivered a dissenting opinion.

STATE HAS NO RIGHT OF APPEAL AFTER VERDICT OF ACQUITTAL: See *Commonwealth v. Cummings*, 50 Am. Dec. 732; *People v. Corning*, 49 Id. 364, note 368; *State v. Solomons*, 27 Id. 469, note 471, where this subject is fully discussed.

DECISION OF ALL QUESTIONS OF FACT must be left to the jury: See *Kisten v. Hildebrand*, 48 Am. Dec. 416; *Gray v. Allen*, 45 Id. 523; *Bank of Pittsburgh v. Whitehead*, 36 Id. 186.

BILLS OF EXCEPTIONS IN CRIMINAL CASES WERE UNKNOWN AT COMMON LAW: *Freeman v. People*, 47 Am. Dec. 216, note 238.

ERRORS IN CRIMINAL TRIALS could, at common law, be redressed only by motion for a new trial, except when the error was in some matter constituting a part of the record, in which case it could be reviewed by writ of error: *Freeman v. People*, 47 Am. Dec. 216.

JURY ARE JUDGES OF LAW AND FACT IN CRIMINAL CASES: *Patterson v. State*, 44 Am. Dec. 530; *contra*: *Lord v. State*, 41 Id. 729.

JURY IS BOUND TO RECEIVE LAW FROM COURT, whether correct or incorrect: *Flemming v. Marine Ins. Co.*, 33 Am. Dec. 33; and see note to *Armstrong's Adm'r v. Keith*, 20 Id. 133, for a discussion of this subject.

IN PROSECUTIONS FOR LIBEL OR SLANDER, the jury are judges of both the law and the fact: *State v. Allen*, 10 Am. Dec. 687; *State v. Lehre*, 4 Id. 596.

THE PRINCIPAL CASE IS REFERRED TO by Dewey, J., in *Commonwealth v. Anthes*, 5 Gray, 185, 237, as a case in which the question whether at common law the jury have, in criminal trials, the right to decide both the law and the facts was considered very elaborately and ably.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

REID'S ADM'R v. STRIDER'S ADM'R.

[7 GRATTAN, 76.]

SUPREME COURT WILL NOT REVIEW ITS OWN JUDGMENT rendered several terms before, upon a writ of error *coram vobis*; this writ not lying in a supreme court.

DEATH OF DEFENDANT IN ERROR, after judgment in lower court and before a decision of the appellate court, does not abate the proceedings, and the case may be reviewed in the name of the executor when it goes back to the court below.

MOTION to set aside judgment of this court rendered in April term, 1845, and reported in 2 Gratt, 38. Strider died in March, 1845, and the case was argued in April, and decided in May of the same year. The motion is made by Reid's administrator, upon the ground that the judgment is void because of Strider's said death. The remaining facts appear from the opinion.

G. N. Johnson, for the motion.

Cooke, for the defendant.

BALDWIN, J. The case presented for our consideration is briefly this: Reid, the owner of a negro boy, on which he had given a deed of trust, agreed with Strider to place him in his possession till the first of January, 1834, when Reid was to refund the money secured by the trust deed (which Strider undertook to discharge) and take back the boy, or receive the balance he should then be worth at a fair valuation, and make a good title for him. Reid failed to perform the condition, and afterwards his administrator brought a suit in equity to redeem

the slave, upon the allegation that the transaction was a mortgage; and it was so held by the circuit court. Reid's administrator was therefore charged with the money advanced, with interest from the first of January, 1834, and credited by the hires: and a small balance being found in his favor, Strider was decreed to pay it, and to deliver the slave. From this decree Strider appealed, and this court, in May, 1845, held the contract to be not a mortgage, but a conditional sale, and the sale not having been abrogated by performance of the condition, that he became Strider's property, without accountability for hires. The decree of the circuit court was therefore reversed, and Strider decreed to pay the balance of the value of the boy on the first of January, 1834, after deducting the money advanced, with interest from that date: See *Strider v. Reid's Adm'r*, 2 Gratt. 38. And now, nearly five years after the decree of this court, a motion is made here, either to set it aside or to award a writ of error *coram vobis*; on the ground that at the time of its rendition Strider had died, to wit, in the month of March previously, and consequently that the case was prematurely and irregularly heard, inasmuch as Strider's death ought to have been suggested, and the appeal revived against his representative.

I need not consider how far this court may amend its judgments and decrees, at a subsequent term, by correcting clerical misprisions in the entries thereof, the question here being of a quite different nature. We are called upon, not to amend, but to reverse, annul, or set aside the decree, in order that the appeal may be replaced upon our docket and heard *de novo* upon its merits, after a revival thereof against Strider's representative; and this, too, upon the application of the adverse party, who might have had the death suggested and process of revival issued before the hearing was had in this court.

It is not the province of this court to exercise appellate jurisdiction over its own adjudications, and it has no process adapted to such a purpose. It has no power to award writs of error to its own judgments, or allow appeals from or bills of review to its own decrees, for any error of law or of fact appearing upon the face of its records. Nor can it, for errors of fact not apparent upon its records, grant writs of error *coram vobis*, or entertain bills of review. It is the appellate forum in the last resort, for the revisal of the judgments and decrees of subordinate tribunals, which it may affirm or reverse, with power in case of reversal to render such adjudication as the inferior court ought

to have rendered. During the same term, its decisions, like those of other courts of record, are within its own breast, and may be modified or rescinded as a more matured consideration may dictate; but after the end of the term, the merits of its adjudications have passed beyond its control. This finality and irreversibility of the judgments and decrees of this court is inherent in the very nature and constitution of the tribunal, and can not be disturbed without deranging the administration of justice, and the introduction of intolerable evils in practice.

This court occupies the like supreme and ultimate position in our judicial system that the house of lords does in that of England. And in the house of lords a writ of error *coram vobis* does not lie for error in fact; for which two reasons are assigned, one technical, and the other politic: the first is, that the record itself is not removed thither, but only the transcript thereof, as with us: the other is, that it is below the dignity of the house of lords, that being the supreme judicature, to examine matters of fact; the substantial meaning of which I take to be, that to do so would be foreign to the nature and purposes of that tribunal: See 2 Tidd's Pr. 1057.

It is true, in relation to writs of error *coram vobis*, that by the act of the twenty-fourth of February, 1820, session acts of 1819-20, it is provided, "that writs of error *coram vobis*, and all other writs of error, may be awarded in vacation, by any judge of the court of appeals, or general court, or any superior court of law, or by any two justices of a county or corporation court, in the same manner and upon the same conditions as may be awarded by the same courts respectively in term time; and that every such writ issued in pursuance of this act shall operate as a *supersedeas*." But this act was not designed to enlarge the powers of the courts therein mentioned, but only to extend certain then existing powers thereof in term time to judges thereof respectively in vacation; and must be construed *redendo singula singulis*, by referring the comprehensive terms, which in the aggregate embrace writs of error of every description, distributively to the appropriate writs of error, of which the respective courts already had cognizance.

The remedy, therefore, for the supposed error or irregularity, by writ of error *coram vobis*, would be wholly unwarranted, and moreover utterly inappropriate, it being merely a common-law writ, and unheard of in chancery proceedings.

And if we look to a bill of review, it is obvious that in a supreme court merely appellate, there is no room for its cogni-

zance, the only tribunal in which such a proceeding can originate being the subordinate court where the original decree was rendered: and even there jurisdiction of it is taken away by an appellate decree of this court, after which a bill of review lies only on the ground of the discovery of new matter affecting the merits of the controversy: *Campbell v. Price et al.*, 3 Munf. 227. And matter of abatement is not capable of being shown by bill of review, as error to reverse a decree: 3 Daniell's Ch. Pr. 1728, note; Story's Eq. Pl., sec. 411; Mitford's Eq. Pl., by Jeremy, 85.

If this court has no process by which to reverse or annul its judgments and decrees of former terms upon the merits, still less can it do so for mere irregularities, and far less by the informal and summary proceeding by motion. Indeed, a final judgment or decree of any court of record can not, without the authority of some statute, be rescinded or amended after the expiration of the term at which it was rendered: 3 Ch. Bills, 407; *Bank of Virginia v. Craig*, 6 Leigh, 399. In the case just cited, this court unanimously overruled a motion for a rehearing, on the ground "that it could not set aside its decree entered at a former term, whether it was prematurely decided, or whether it was objectionable on the merits or not."

With that decision the case of *Wynn v. Wyatt's Adm'r*, 11 Leigh, 584, can not be regarded as in conflict. There, it is true, a judgment of this court of one term was at the next term thereafter set aside and a rehearing directed; but the reporter suggests that the motion for it had been made at the previous term, and held under advisement. That this was so may be inferred from the fact that no question seems to have been made as to the power of the court to re-examine its judgment of a former term; a question too grave to have been disregarded, especially after the solemn decision upon that point in the *Bank of Virginia v. Craig*, *supra*. And this inference is strengthened by an order of the court after the allowance of the rehearing, stating that before it was granted the transcript of the judgment had been improvidently certified to the court below, and therefore recalling the same. What I have said is based upon the hypothesis that there is error or irregularity in fact in the failure to suggest the death of the appellant Strider, and proceeding to the appellate hearing and decree, without a revival of the appeal against his representative; but I am far from entertaining that opinion.

At common law actions abated by the death of the plaintiff or

defendant, and were incapable of revival, though originally maintainable for or against the representative of the deceased. A suit in equity also abated by the death of either party; but if originally maintainable for or against the representative of the deceased, could always be revived by bill of revivor, and now by statute may be revived by *scire facias*: 1 Rev. Code, 497. The English statutes, and ours conforming to them, and extended to suits in equity, which authorize revival by *scire facias*, have no application to writs of error or appeals. These never abated by the death of either party (with one exception), for the reason, I presume, that there is no abatement of the original judgment or decree, and the reversal or affirmance thereof is the only matter involved in the appellate cause. The exception is in the case of the death of the plaintiff in error before his assignment of errors, which probably rests upon the ground that the proceeding has not been perfected, and there must be a new writ of error. This exception prevails in the English practice, the assignment of errors being made there after the writ of error has been sued out, and is in the nature of a declaration, upon which an issue is made up usually by the plea of *in nullo est erratum*, which is in the nature of a demurrer. It is unknown, however, in our practice where there are no pleadings in error, unless of a release or the like, and the death of the plaintiff can not occur before the assignment of errors, which is always made in the petition for the writ.

According to the English practice, if the plaintiff in error dies after the assignment of errors, or the defendant in error dies, whether before or after such assignment, the case proceeds in the names of the original parties to hearing and judgment, and the original judgment, if affirmed, is revived in the court below by *scire facias*: 2 Tidd's Pr. 1094. In equity an appeal to the house of lords is prayed for by petition to the house, and allowed by its order; to which petition an answer is put in, denying error in the decree and praying its affirmance; upon which issue, or an order of the house in case of default, the appeal is appointed to be heard. If either party dies before hearing, the appeal is revived, upon petition, in the name of the representative of the deceased: 3 Daniell's Ch. Pr. 1634 et seq.

With us, writs of error or *supersedeas* and appeals, allowed by this court or a judge thereof in vacation, are prayed for by petition, in which the errors complained of are assigned or set forth; and process is issued and served upon the adverse party, and a hearing is had after appearance by counsel, or in case of

default; without appellate pleadings unless of some extrinsic matter in bar.

And though there is no abatement of appellate causes in this court, whether of law or equity, and our statutes for revival of actions or suits have no application to them; yet a practice prevails here, probably borrowed in substance from that of the English house of lords, in equity, requiring in case of the death of either party a revival of the appeal or writ of error by consent or by *scire facias*: *Bank of Alexandria v. Patton*, 1 Rob. (Va.) 499. It is however a general rule of convenience and policy, applicable only where the death of the party is made known to the court and suggested on its record; and there may be circumstances under which the suggestion itself will not be permitted by the court. And if the appellate cause passes through this court without such suggestion, there is no ground for the imputation of error or irregularity in the proceedings here; and the judgment or decree of this court is remitted to the court below, and entered upon the record there, and a revival then had there of the original judgment or decree in case of affirmance, or of that of this court in case of reversal.

I think the motion made by Reid's administrator ought to be overruled. To sustain it would introduce a practice fraught with incalculable mischief. Hundreds of causes pass through this court without information on the part of the court, or of the counsel concerned, of deaths of parties; and much of our time would be most unprofitably employed, and to the great detriment of suitors, in setting aside our own adjudications rendered upon mature consideration of the merits, for supposed irregularity in the proceedings.

CABELL, P., and ALLEN and DANIEL, JJ., concurred in the opinion of BALDWIN, J.

BROOKE, J., concurred in the judgment.

Motion overruled with costs.

COURT CAN NOT SET ASIDE ENTRY OF FINAL JUDGMENT at a subsequent term: *Morgan v. Hays*, 12 Am. Dec. 147, and note thereto; see also *Fortenberry v. Frazier*, 39 Id. 373. The principal case is cited to the point that "after a former term of the court of appeals has closed, its adjudications, right or wrong, must stand irreversible and final, and the controversies between the parties whose rights have been adjudicated are closed forever," in *Griffin v. Cunningham*, 20 Gratt. 31; see also *Campbell v. Hughes*, 12 W. Va. 183, wherein the principal case is cited to much the same point.

SMITH v. THOMPSON.

[7 GRATTAN, 112.]

COURTS OF EQUITY WILL REFUSE THEIR ASSISTANCE WHERE THERE HAS BEEN GROSS LACHES or long acquiescence on the part of the party seeking the relief.

WILLIAM MITCHELL, jun., and Charles Thompson, jun., in the year 1815, borrowed of Francis Jerdone ten thousand dollars, and executed to him their joint obligation, with Thomas Price and others as sureties. William Mitchell, jun., paid his half of the above bond in the year 1821, and Charles Thompson, jun., delivered to Mitchell a bond of indemnity, with Nathaniel Thompson and Nathaniel A. Smith as sureties, to secure him from the payment of his (Thompson's) share of the bond. This bond could not be found, and complainants charge that it was lost. William Mitchell, jun., died in 1822, and bequeathed his estate by will to Isabella Mitchell, his mother, and Mrs. Garland Thompson, his sister, and appointed Garland Thompson his executor, who qualified as such, with Charles Goddall and others as his sureties. Mrs. Mitchell, dying shortly after, left her estate to Mrs. Garland Thompson. The property of Mitchell, jun., thus descended largely to Garland Thompson, and from Thompson to the complainants. In 1845 Garland Thompson died, and Charles Thompson, jun., became his executor and also administrator *de bonis non* with the will annexed of the above-mentioned estate of William Mitchell, jun. He had recently been removed, and Philip M. Thompson, the plaintiff, had qualified upon the estate of Garland Thompson, and the estate of William Mitchell had been transferred to the public administrator. Charles Thompson and Nathaniel Thompson had recently become insolvent, and unable to pay the balance of the Jerdone loan, but before that time had been in prosperous circumstances. Jerdone's representatives had recovered judgment against Price's representatives, and they in turn recovered against the sureties of Garland Thompson as executor of William Mitchell, jun., and said last parties, having paid the judgment, sued the complainants as administrators of Garland Thompson and Isabella Mitchell and other parties. The defendants in the bill were the personal representative, widow, and children of said Nathaniel A. Smith, Charles Thompson, jun., Nathaniel Thompson, the sureties of Garland Thompson as executors of Mitchell, and several others. The bill prayed that the representatives of Smith be compelled to save the com-

plainants harmless against all loss on account of the debt of Jerdone, more particularly the demand of the sureties of Garland Thompson, as executor of Mitchell, and for other relief. At the trial evidence was introduced by both sides as to whether or not the above-mentioned indemnity bond was ever executed or delivered to Mitchell; the Smiths denying any knowledge of it, and requiring the strictest proof. The remaining facts, as far as necessary for an understanding of the case, appear from the opinion.

Steger and Morson, for the appellants.

Daniel, jun., and Patton, for the appellees.

By Court, BALDWIN, J. The plaintiffs in this case have shown no original equity to set up and enforce the bond of indemnity in the proceedings mentioned, against the representatives of Nathaniel Smith, one of the sureties therein. According to their own pretensions, the plaintiffs are the representatives of Garland Thompson, and not of William Mitchell, to whom that bond is alleged to have been executed; and the condition thereof was not for the indemnity of the representatives of Thompson, but of Mitchell. Nor have the plaintiffs acquired any equity from the circumstance that the estate of Garland Thompson was derived in part from William Mitchell; the bond of indemnity not being a covenant running with the estate of Mitchell, whether real or personal, against others acquiring the same as purchasers, or as volunteers.

If the plaintiffs can derive any equity against the sureties in the bond of indemnity, it must be from a subrogation by anticipation to the successive remedies of others. These remedies are the judgment of the administrators of Jerdone upon the original bond which was the subject of the indemnity, against the executors of Price, who was one of the sureties therein; the judgment on the relation of Price's executors against the sureties in the official bond of Garland Thompson, who had been executor of William Mitchell; the claim of those sureties to reimbursement against the representatives of Garland Thompson; the claim of those representatives to be reimbursed by Mitchell's representatives; and a consequent claim of the latter to the protection afforded by the bond of indemnity.

It is therefore only by treating their suit as a bill *quia timet*, and for subrogation against those who ought ultimately to be subjected to a burden with which they are threatened, that the plaintiffs can be entitled, if at all, to the relief which they seek

In that aspect of their case, their claim is to a mere equity, which, like other equities, is open to the defense of laches and lapse of time.

The presumption of payment arising from lapse of time, when applicable to a legal demand, as in the case of a debt secured by bond, may be repelled by satisfactory evidence that the debt in point of fact has not been paid. That presumption arose in regard to the original bond executed by Mitchell and Charles Thompson and their sureties to Jerdone, which was payable in January, 1815, and upon which the action of Jerdone's administrators was not brought until after the expiration of about thirty years. The judgment recovered by the plaintiffs in that action is conclusive, as between the parties thereto, against the presumption of payment: but it does not conclude the representatives of Nathaniel A. Smith, who were neither parties nor privies, and the judgment was recovered by default, and without notice to them pending the action. The question therefore arising upon the legal presumption of payment, and the evidence relied upon to repel it, is still open in the present suit: but upon that question the court deems it unnecessary to express an opinion. Nor is it necessary to decide another question presented by the pleadings and evidence, to wit, whether the alleged bond of indemnity was ever executed by Nathaniel Smith.

The plaintiffs in the present suit are not seeking the aid of a court of equity to enforce a legal demand on their part against the representatives of Nathaniel Smith. They never had any cause of action upon the bond of indemnity alleged to have been executed by Charles Thompson and his sureties to Mitchell. They have at most, as above indicated, a mere equity to be subrogated to the place of Mitchell's representative, upon the supposition that the latter may be coerced to pay the balance asserted to have been in arrear upon the original bond, and the fear that the plaintiffs may consequently be subjected to the loss. Without deciding upon the original merits of the case in that aspect, the court is of opinion that the plaintiffs are debarred in a court of equity, under the circumstances of laches and lapse of time disclosed by the record, from the relief which they seek.

This suit was not brought until August, 1845, more than thirty-four years after the original bond to Jerdone was payable, and more than twenty-three years after the date of the bond of indemnity. In the mean time Garland Thompson was the executor of Mitchell from December, 1822, until he died in May,

1835, a period of nearly thirteen years; and it was his duty to make payment of the debt to Jerdone, or require it to be paid by Charles Thompson; and Charles Thompson himself was administrator *de bonis non* with the will annexed of Mitchell, from May, 1836, and also the executor of Garland Thompson from June, 1835, until the revocation of his powers as such in April, 1844; and was bound to see to the discharge of the debt, in his representative as well as his individual character. And yet, the debt to Jerdone and the claim of Mitchell's estate to indemnity were suffered to sleep until after Charles Thompson, the original debtor, became, within a few years before the institution of this suit, utterly insolvent. And now after such great lapse of time, and laches on the part of the plaintiffs, and those through whom they derive their supposed equity, they seek by a bill *quia timet* to set up the bond of indemnity against the representatives of a deceased surety, upon the supposition of its accidental loss because it can not be found, and does not appear ever to have been seen by any one since the time of its alleged execution and delivery to Mitchell.

The pretensions of the plaintiffs against the representatives of Smith are at war with the sound and well-settled doctrine of equity, derived not merely from the presumptions and bars which prevail at law, but still more comprehensive, and founded upon considerations of policy and justice, that require those who invoke its jurisdiction to do so within a reasonable time, instead of lying by until by their supineness and negligence there can no longer be a safe determination of the controversy, and their adversaries are exposed to the danger of injustice from loss of information and evidence and means of recourse against others, occasioned by deaths, insolvencies, and other untoward circumstances. The application of this equitable doctrine is for the sound discretion of the equitable forum, and does not require the conviction of the court against the original justice of the claim, or of any other specific ground of defense, but its belief that under the circumstances of the case it is too late to ascertain the merits of the controversy.

The court is therefore of opinion that the plaintiffs are not entitled to the relief which they seek, and that the defendants, whose property has been sequestrated and sold in the progress of the cause, must be restored to the proceeds thereof.

Decree reversed with costs, and bill dismissed with costs.

DANIEL, J., dissented. He was for affirming the decree.

ALLEN, J., absent.

WHEN EQUITY WILL REFUSE RELIEF BECAUSE OF LACHES. — The application of the statute of limitations to courts of equitable jurisdiction, and their observance of it, either directly or by way of analogy, is extensively discussed in the note to *Frame v. Kenny*, 12 Am. Dec. 368, and a further review of the subject would be but surplusage. But the doctrine of the principal case, that in the absence of a statutory provision, and independent of legal limitation, courts of equity will discourage laches and delay, is a familiar one in courts of equity jurisdiction, and has been followed by those courts in most of the states of the Union, and is a familiar rule of application in the federal courts: See *Johnson v. Diversey*, 82 Ill. 446; *Liverpool etc. v. Grand etc.*, 125 Mass. 490; *Shorter v. Smith*, 56 Ala. 208; *Sumner v. Pacific R. R. Co.*, 4 Mo. App. 586; *Hancock v. Harper*, 86 Ill. 445; *Harlow v. Lake Superior Iron Co.*, 41 Mich. 583; *Godden v. Kimmel*, 99 U. S. 201; *Livingston v. Salisbury*, 16 Blatchf. 549; *Spaulding v. Farwell*, 70 Me. 17; *Kellogg v. Wilson*, 89 Ill. 357; *Pierce v. McClellan*, 93 Id. 245; *Sergeant v. Bigelow*, 24 Minn. 370; *Gorden v. Ross*, 63 Ala. 363; *Coddington v. R. R. Co.*, 103 U. S. 409; *Bercy v. Lavretta*, 63 Ala. 374; *Gibbons v. Hoag*, 95 Ill. 45; *Maher v. Farwell*, 97 Id. 56; *Hume v. Long*, 53 Iowa, 299; *German Am. Sem. v. Kiefer*, 43 Mich. 105; *Birdsall v. Johnson*, 44 Id. 134; *Williams v. Williams*, 50 Wis. 311; *Pacific etc. v. Missouri etc.*, 2 McCrary, 227; *McCoy v. Poor*, 56 Md. 197; *Hagerty v. Mann*, Id. 522; *Kelley v. Hurt*, 74 Mo. 561; *Oakley v. Hurlbut*, 100 Ill. 204; *Bissell v. Loyd*, Id. 214; *Lequotte v. Drury*, 101 Id. 77; *Allen v. Allen*, 47 Mich. 74; *Pipe v. Smith*, 5 Col. 146; *Wagner v. Baird*, 7 How. 234; *Prevost v. Gratz*, 6 Wheat. 481; *Hughes v. Edwards*, 9 Id. 489; *Elmendorf v. Taylor*, 10 Id. 152; *Piatt v. Vattier*, 9 Pet. 405; *Boone v. Childs*, 10 Id. 177; *McKnight v. Taylor*, 1 How. 161. The English cases are equally pronounced in favor of this doctrine: See *Smith v. Clay*, 2 Amb. 646; *Cholmondeley v. Clinton*, 2 Jac. & W. 1; *Portlock v. Gardiner*, 1 Hare, 594; *Stackhouse v. Barnston*, 10 Ves. 453; *Ex parte Dewdney*, 15 Id. 479; *Beckford v. Wade*, 17 Id. 96; *Vigors v. Pike*, 8 Cl. & Fin. 650; *Boul v. Hopkins*, 1 Sch. & Lef. 429; *Greenfell v. Gridlestone*, 2 You. & Coll. 662; *White v. Pamther*, 1 Kn. 226; *Titram v. Williams*, 3 Hare, 347. In *Smith v. Clay*, 3 Bro. C. C. 640, note; Lord Camden, delivering the opinion of the court, said: "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his right, and acquiesced for a great length of time; nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced; and therefore from the beginning of this jurisdiction there was always a limitation to suits in this court. Therefore in *Fritter v. Lord Macclesfield*, Lord North said rightly, that though there was no limitation to a bill of review, yet after twenty-two years he would not reverse a decree but upon very apparent error. *Expedit reipublicæ ut sit finis litium*, is a maxim that has prevailed in this court in all times, without the help of an act of parliament. But as the court has no legislative authority, it could not properly define the time of bar, by a positive rule, to an hour, a minute, or a year. It was governed by circumstances. But, as often as parliament had limited the time of actions and remedies to a certain period in legal proceedings, the court of chancery adopted that rule, and applied it to similar cases in equity. For, when the legislature had fixed the time at law, it would have been preposterous for equity (which by its own proper authority always maintained a limitation) to countenance laches, beyond the period that law had been confined to by

parliament, and therefore, in all cases where the legal right has been barred by parliament, the equitable right to the same thing has been concluded by the same bar."

In *Cholmondeley v. Clinton*, *supra*, the court said: "They [the courts of equity] have refused relief to stale demands even in cases where no statuteable limitation existed." The rule, as laid down by Lord Camden in *Smith v. Clay*, *supra*, has been expressly adopted by the supreme court of the United States in *Wagner v. Baird*, 7 How. 234, and in *Bourman v. Wathen*, 1 Id. 189. Mr. Justice Story, in his work on equity jurisprudence, section 1520, says: "A defense peculiar to courts of equity is founded upon the mere lapse of time and the staleness of the demand in cases where no statute of limitations directly governs the case. In such cases, courts of equity act sometimes by analogy to the law, and sometimes act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands by refusing to interfere where there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights." The same or a similar rule has been laid down and followed in each of the following cases: *Marshall v. Means*, 12 Ga. 61; *Rogan v. Walker*, 1 Wis. 631; *Dickerman v. Burgess*, 20 Ill. 266; *Stokes v. Lebanon and Spartan Tp. Co.*, 6 Humph. 241; *Hough v. Coughlan*, 41 Ill. 131; *Hutchison v. McNutt*, 1 Ohio, 14; *Blanchard v. Williamson*, 70 Ill. 647; *Barnes v. Taylor*, 27 N. J. Eq. 259; *In re Butler*, 2 Hughes, 247; *Nealy's Appeal*, 85 Pa. St. 387; also note to *Frame v. Kenny*, 12 Am. Dec. 368; *Armstrong v. Campbell*, 24 Id. 556, and note, wherein numerous cases are cited; *Perkins v. Cartmell*, 42 Id. 753, and cases cited in note; *Johnson v. Toulmin*, 52 Id. 212, and note. But, as above stated, courts of equity have established no exact time, "to an hour, a minute, or a year," within which a party's claim to relief, or assertion of a right, is barred by lapse of time. The courts, in the exercise of their discretion, take into consideration the circumstances of the case, the conditions in which the parties have been placed, and the extent to which, upon an examination of the case, the element of laches has entered into it. In *In re Butler*, 2 Hughes, 247, the vendor of real estate assigned a bond for part of the purchase money, and afterwards the vendor, upon the representations of the vendee that he had paid the bond, executed to him a deed of the premises, which deed was promptly recorded, and the vendee, holding possession for fifteen years, other liens attached to the land. The court refused relief to the assignee of the bond, because of his laches and the intervening equities. So in *Nealy's Appeal*, 85 Pa. St. 387, a party who had obtained a decree for the possession of some plans and drawings, but during the space of twenty-five years made no effort to enforce the decree, during which time the plans had passed to a *bona fide* purchaser for value, it was held by the court that he was guilty of laches, and had no standing in a court of equity. So fifty years' neglect to make a demand for the issuance of some shares of stock to which plaintiff's ancestor was entitled, and which had been held and claimed by innocent third parties during that time, was held to constitute a bar to his recovery: *Livingston v. Salisbury*, 16 Blatchf. 549.

In *Kellogg v. Wilson*, 89 Ill. 357, which was an action to set aside an irregular sale, the court said: "A delay of fifteen years after the sale was made and confirmed before relief is asked of a court of equity, is such inexcusable laches as must condemn plaintiff's claim as stale." So in *Coddington v. Railroad Co.*, 103 U. S. 409, eight years delay in bringing a suit to set aside a contract, upon the ground of fraud, where the circumstances of fraud were known during the whole time, was held by the court to constitute such laches as

would bar the plaintiff's right to recover. In the case of *Birdsall v. Johnson*, 44 Mich. 135, the plaintiff brought an action to quiet title after an acquiescence, with knowledge of the facts, for twenty-five years, and the court, in affirming the judgment of the lower court dismissing the action, said: "We are of the opinion that the long and unexplained delay of Birdsall would cut off any equities if he had them, and that he has neither a legal nor an equitable title to relief." The stockholders in a railway corporation, with full knowledge that their officers were making an insufficient defense to a suit for foreclosure, neglected to avail themselves of their right to interpose, and lay by for four years without endeavoring to obtain relief. During that time the decree of foreclosure had been fully executed, the property sold, and the sale confirmed. A new corporation purchased it and issued bonds, etc., secured by mortgage upon the foreclosed premises. At the expiration of four years the stockholders, endeavoring to obtain relief, were refused it upon the ground of laches: *Pacific R. R. v. Missouri R. R.*, 2 McCrary, 227. But "mere delay alone, short of the period fixed as a bar by the statute of limitations, will not preclude the assertion of an equitable right. It is only where, by delay and neglect to assert a right, the adverse party is lulled into doing that which he would not have done in reference to the property, had the right been properly asserted, that the defense of laches can be considered:" *Gibbon v. Hoag*, 95 Ill. 45; and accordingly, where the party brought suit in due time, but the occurrence of the civil war prevented her from having communication with her counsel, she being domiciled in one of the disloyal states, and the suit was delayed until the close of the war, when it was revived and duly prosecuted until the record, then very voluminous, was destroyed in the great Chicago fire of October, 1871, and the suit was then commenced *de novo*, upon the defense of laches being interposed, the court would not sustain it, holding, that from the circumstances, due diligence had been shown: See *Johnson v. Diversey*, 82 Id. 446. So delay in the final settlement of testamentary account is not laches if caused by *lis pendens*: *Colwell v. Miles*, 2 Del. Ch. 110. If a party has a clear right in equity, with no remedy at law, if it appears that no unconscientious result will follow relief, mere delay in bringing his action will not cause a court of equity to refuse it: *Spurlock v. Sproule*, 72 Mo. 503. The principal case is cited in *Smith v. Britton*, 2 Patt. & H. 124; and in *Bargaman v. Clarke*, 20 Gratt. 544, where the court said: "It is a principle of courts of equity not to take cognizance of an equitable claim after a great lapse of time."

WHEN LACHES BARS RELIEF BY SPECIFIC PERFORMANCE.—The general rule that equity discountenances laches and stale applications for relief applies with particular force to the equitable remedy of specific performance. Story, in his work on equity jurisprudence, says with regard to the party applying for such relief: "If he has been guilty of gross laches, or if he applies for relief after a long lapse of time, unexplained by equitable circumstances, his bill will be dismissed:" Sec. 771. In a more recent work on the same subject, the learned author says: "The doctrine is fundamental that a party seeking the remedy of specific performance, and also the party who desires to maintain an objection founded upon the other's laches, must show himself to have been 'ready, desirous, prompt, and eager:'" Pomeroy's Eq. Jur., sec. 1408. This doctrine has been held and decided in a great number of cases, and to refer to them all would be both laborious and unnecessary. We cite below a number of the principal cases holding this doctrine: *Johnson v. Somerville*, 33 N. J. Eq. 152; *Marshall v. Perry*, 90 Ill. 289; *Preston v. Preston*, 95 U. S. 200; *Henderson v. Hicks*, 58 Cal. 364; *Green v. Covilland*,

10 Id. 317; *Hanchworth v. Murphy*, 21 N. J. Eq. 118; *Lawrence v. Lawrence*, Id. 317; *Merritt v. Brown*, Id. 401; *Hubbell v. Schoening*, 58 Barb. 498; *Campbell v. Hicks*, 19 Ohio St. 433; *Callen v. Ferguson*, 29 Pa. St. 247; *Maddox v. McGuaen*, 3 A. K. Marsh. 400; *Dubois v. Baum*, 46 Pa. St. 537; *Miller v. Henlon*, 51 Id. 265; *Andrews v. Bell*, 56 Id. 343; *Ins. Co. v. Union Canal Co.*, Bright. 48; *Colcock v. Butler*, 1 Desau. 307; *White v. Bennett*, 7 Rich. Eq. 260; *Bracken v. Martin*, 3 Yerg. 55; *Decordova v. Smith*, 9 Tex. 129; *Walker v. Emerson*, 20 Id. 706; *Glascock v. Nelson*, 26 Id. 150; *Williams v. Matlocks*, 3 Vt. 189; *Richardson v. Baker*, 5 Call, 514; *Smith v. Hampton*, 13 Tex. 459; *Pigg v. Corden*, 12 Leigh, 69; *Brashier v. Gratz*, 6 Wheat. 528; *King v. Hamilton*, 4 Pet. 311; *Watson v. Reid*, 1 Russ. & M. 236; *Watts v. Waddle*, 6 Pet. 389; *Coulson v. Walton*, 9 Id. 62; *Holt v. Rogers*, 8 Id. 420. The amount of diligence and promptness necessarily differs with the circumstances of each case, and in some instances the courts are very strict, as will be seen from the above authorities, and particularly *Campbell v. Hicks*, 19 Ohio St. 433, where a delay of twenty-eight days, coupled with other circumstances of negligence, was held a bar. In case of unexplained delay, coupled with a change materially affecting the rights and obligations of the parties, the courts are pronounced in their refusal to interfere or relieve: *Callen v. Ferguson*, 29 Pa. St. 247; *Dubois v. Baum*, 46 Id. 537; *Miller v. Henlon*, 51 Id. 265; *Ins. Co. v. Union Canal Co.*, Bright. 48; and in *Holt v. Rogers*, 8 Pet. 420, where the court, *per* Story, J., said: "Even where time is not the essence of the contract, they [courts of equity] will not interfere where there has been long delay and laches on the part of the party seeking a specific performance; and especially will they not interfere where there has in the mean time been a great change of circumstances, and new interests have intervened." Under different circumstances, different durations of time have been held to constitute a bar, as in *Smith v. Hampton*, 13 Tex. 459, where the court, in dismissing petitioner's bill for relief after fourteen years' delay, said: "The law protects those who watch over and not those who sleep upon their rights. Where time is suffered to elapse, and throw darkness over the transaction, the presumption is that some other arrangement has intervened, by which former agreements have been annulled; or that the parties are or should be satisfied to leave their rights in the condition in which, by their own acts, they have been placed." In *Hubbell v. Schoening*, 58 Barb. 498, the rather strict rule was laid down, that where the plaintiff in an action for specific performance failed to pay for and accept a conveyance of the property agreed to be sold upon the day agreed upon, although it appears from the case that he was ready immediately after, equity would fail to interfere. A delay of sixty-four years was held by Chancellor Van Fleet to constitute a bar to relief, and his honor, apparently indignant at the contemplation of such a superannuated demand, closed his opinion in the case by saying: "The claim made in this case is exceptionally stale. I can find no instance in which one so remarkable for its antiquity has ever before been presented for judicial approval, and I think it should, for that reason alone, be held to be barred." *Johnson v. Somerville*, 33 N. J. Eq. 152. In *Marshall v. Perry*, 90 Ill. 289, nine years' delay, other equities intervening, was held to constitute a bar.

BUT CONSIDERABLE LAPSE OF TIME WILL NOT IN EVERY CASE OPERATE AS BAR to relief by specific performance. In the well-considered case of *Coulson v. Walton*, 9 Pet. 62, a bill was filed for the enforcement of a bond executed thirty-five years before, and it appearing that the petitioner, the representative of Payne, the obligee, had endeavored to execute his part of the agreement,

the court said: "When the condition of the parties, their remote residence from each other, their death, and the state of the country and its tribunals are considered, it would seem that, instead of being negligent in the prosecution of the claim for a title to the land, Payne and those who claim under him have shown more than ordinary diligence." So mere delay, unless it amounts to an abandonment, will not bar the relief: *New Barbadoes v. Vreeland*, 4 N. J. Eq. 157. If the vendee, under an agreement for the sale of lands, goes into possession of the premises, lapse of time will not bar his right to have his contract specifically enforced: *Waters v. Travis*, 9 Johns. 450; *Scarlett v. Hunter*, 3 Jones Eq. 84; *Miller v. Bear*, 3 Paige, 466; *Stretch v. Schenck*, 23 Ind. 77. So where the delay in making payment was caused by litigation affecting the title of the property agreed to be sold: *Galloway v. Barr*, 12 Ohio, 354; *Oraig v. Leiper*, 2 Yerg. 193; and a delay of eighteen years was not fatal, where a large part of the purchase price has been paid and a judgment docketed for the remainder: *McLaughlin v. Shields*, 12 Pa. St. 263. The recent recognition by a party of his liability to convey amounts to a waiver, and he can not resist a bill for specific performance upon the ground of laches: *Eisbank v. Hampton*, 1 Dana, 343; *Stewart v. Stokes*, 33 Ala. 494. Where, from an examination of all the circumstances connected with an agreement for the sale of lands, it appears that time was not of the essence of the contract, mere delay will not bar the petitioner's right to relief: *Glover v. Fisher*, 11 Ill. 666; *Voorhies v. Demeyer*, 2 Barb. 37; *Farris v. Bennett*, 26 Tex. 568; *Duran v. Sage*, 11 Wis. 151; *Hanna v. Ratakin*, 43 Ill. 462. See also *Collins v. Van Dever*, 1 Iowa, 573; *Buck v. Holloway*, 2 J. J. Marsh. 163; *Somerville v. Freeman*, 4 Har. & M. 43; *Haffner v. Dickson*, 2 Har. & J. 46; *Ashmore v. Evans*, 11 N. J. Eq. 151; *Falls v. Carpenter*, 1 Dev. & B. Eq. 237; *Osborn v. Breman*, 1 Desau. 486; *Keon v. White*, Meigs, 358; *Hodges v. Johnson*, 15 Tex. 570.

WEST'S ADM'R v. THORNTON ET AL.

[7 GRATTAN, 177.]

LACHES, IN ASSERTING CLAIM when unexplained, is a good defense to a suit to redeem, as the hazard of injustice to others in calling for accounts of hires and profits is too great.

BILL to redeem certain slaves which complainants allege were mortgaged by Meaux Thornton to Robert West to secure an indebtedness of said Thornton to West, and also to have a settlement of Robert West's administration upon the estate of Meaux Thornton. The action is brought by the administrator *de bonis non* and the distributees of Meaux Thornton against the administrator *de bonis non* of Robert West, and others. January 17, 1807, Thornton conveyed to Robert West seven slaves, also his interest in a suit then pending against the administrator of John Perrin as security for the payment of over one hundred pounds. He also empowered him to sell as many of said slaves as would be necessary to pay the said debt, provided that said debt was not satisfied out of the Perrin judgment within six

months. Thornton afterwards died, and West was appointed his administrator on the sixth of February, 1809. West now took the slaves (it does not appear whether or not he took possession of them before) and removed with them to Buckingham county, where he continued to hold them until he died, in 1816. George M. West qualified as his executor in January, 1817, and the slaves were by him inventoried as the property of the estate of deceased, and were held by him as such until 1824, when he died. Price Perkins, sheriff of Buckingham county, then took charge of the unadministered portion of the estate of Robert West, deceased. He held the slaves until 1829, when they were levied upon and sold under a decree of court in an action against said Perkins as administrator *de bonis non* of Robert West. This suit was commenced in June, 1832, and complainants in their bill declared in conformity to the above statement, and as an excuse for delay alleged that a suit had been brought by John W. Perrin against Thornton in his life-time, and revived against his administrator, for the recovery of the above-mentioned slaves, and that said suit had been but recently decided in favor of Thornton's administrator. A copy of the record in this suit is made part of this case. Thornton, in answer to Perrin's bill, alleged title in himself; after his death and the revival of the suit against his administrator, Robert West, who made no defense, it was again, at his death, revived against George M. West, his executor, who filed an answer denying Perrin's title to the slaves, and asserted his own through the original deed or mortgage by Meaux Thornton to Robert West. The remaining steps in this suit it is unnecessary to state, as also the different points raised by counsel, as the only issue which the court considered was lapse of time, and the laches of complainants.

Daniel, Taylor, Patton, and Baxter, attorney general, for the appellants.

Lyons, for the appellees.

By Court, ALLEN, J. The court is of opinion that, under any aspect of the appellees' claim, they are not entitled to the relief prayed for. The alleged mortgage by Meaux Thornton to Robert West was executed on the seventeenth of January, 1807. When Robert West acquired possession of the slaves does not distinctly appear. Meaux Thornton having died, Robert West administered on his estate in the county court of Gloucester, in February, 1809. It is alleged he took possession of the slaves as administrator, not as mortgagee; but of this allegation there

is no proof. The records of Gloucester county court having been destroyed by fire, no account of his administration appears; and none, after such a lapse of time, and the death of the original parties and their immediate representatives, can now be looked for. In the mean time the slaves were removed by Robert West to another county, where he died. In 1817 his executor, George M. West, administered on his estate, took possession of the slaves as the assets thereof, and died in 1824; and his administratrix, Jane West, having been removed, administration of his estate has been committed to the sheriff. After the death of George M. West, administration *de bonis non* of the estate of Robert West was committed to Price Perkins, sheriff of Buckingham, in November, 1824. He took possession of the slaves as part of the unadministered assets of the estate of Robert West, and held them until February, 1829, when they were sold as assets of that estate, at the suit of the creditors thereof. On the thirteenth of June, 1832, this suit was instituted, twenty-five years after the execution of the mortgage, twenty-three years after the death of Meaux Thornton and administration on his estate, fifteen years after the death of Robert West and administration on his estate, eight years after the death of his executor, and three years after the sale of the negroes as assets of Robert West's estate found in the hands of the sheriff, his administrator *de bonis non*. The long delay and laches of the appellees in asserting their claim is not satisfactorily accounted for. The suit of Perrin, asserting an adverse claim to the property against Meaux Thornton, does not furnish a sufficient apology. If they had notice of the suit at all, they would have perceived that, as early as 1817, George M. West, the executor of Robert West, asserted by his answer, that his testator, Robert West, had a clear and just title to the property; thus setting up and insisting upon a title adverse to the claim of the appellees. This assertion of an adverse claim should have led to inquiry. Had such inquiry been made, they would have perceived that the executor had made the allegation in good faith; that he had inventoried the slaves as part of the assets of his testator; thus making himself responsible to creditors and distributees for their hires and value.

It does not appear when administration *de bonis non* upon the estate of Meaux Thornton was taken out, or how long it remained unrepresented after the death of Robert West; the fact, if material, should have been shown by the appellees. But so far as the record discloses, they were all competent to act for

themselves at the death of Meaux Thornton; no disability is alleged or shown. As distributees of Meaux Thornton they were the proper parties to have sued the administrator for a settlement and distribution; and that is one aspect of their bill. And though the personal representative was the proper party to file the bill to redeem, yet those who claim through him are not relieved from the consequences of their gross laches, if without any valid excuse they fail to take the proper steps to procure a representative for such a length of time, and until after such a change of parties and circumstances as to render it doubtful whether any decree can be pronounced without the hazard of injustice. In this case, the assertion of their claim involves the settlement of the administration account of Robert West on Meaux Thornton's estate, fifteen years after the death of the administrator, and after the destruction of the records of the court by which administration was granted; a settlement of the administration account of George M. West, executor of Robert West, eight years after his death; an account of the hires and profits of the slaves from 1809, after the death of all the original parties and their immediate representatives, and after the property itself has passed into the hand of *bona fide* purchasers, and the proceeds arising from the sale have been applied to the payment of the creditors of Robert West's estate.

The court is therefore of opinion that upon the ground of adverse claim asserted upon the part of the estate of Robert West, and so long uncontroverted, the laches of the appellees in asserting their claim, and the hazard of injustice to others in going into settlements of estates, and calling for accounts of hires and profits of slaves under the circumstances of this case, the bill of the appellees should have been dismissed.

BALDWIN, J., concurred in so much of the decree as dismissed the bill as to Price Perkins individually, beyond the hires of the slaves whilst in his hands, but dissented from the residue; being of opinion that the appellees are not precluded from relief by the statute of limitations or lapse of time.

Decree reversed, and bill dismissed.

CABELL, P., and BROOKE, J., absent.

THE PRINCIPLE UPON WHICH THE ABOVE CASE WAS DECIDED is fully discussed in the note to *Smith v. Thompson*, ante, p. 126.

THE PRINCIPAL CASE IS CITED in *Smith v. Britton*, 2 Patt. & H. 124; and in *Bargeman v. Clarke*. 20 Gratt. 544, to the point involved in the syllabus.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

GETTY v. ROUNTREE.

[2 PINNEY, 379; 2 CHANDLER, 28.]

WARRANTY OF QUALITY WILL NOT IN GENERAL BE IMPLIED, where none is expressly made, on a sale of goods or chattels, present and in view of the parties.

WARRANTY THAT CHATTEL IS REASONABLY FIT FOR PURPOSE INTENDED IS IMPLIED when ordered from a manufacturer for a specific purpose.

VENDEE'S REMEDY FOR BREACH OF WARRANTY OF QUALITY is to retain the chattel and sue on the warranty, or if sued for the price, to recoup his damages.

VENDEE MAY RECOUP HIS DAMAGES FOR BREACH OF WARRANTY OF QUALITY in an action by the vendor on a promissory note given by the vendee for the price.

OFFER TO RETURN CHATTEL, OR GIVING NOTICE OF DEFECTS, by vendee, is unnecessary where there is a warranty and no fraud.

ASSUMPSIT on a promissory note. The opinion states the facts
J. T. Mills, for the plaintiffs in error.

Benjamin C. Eastman, for the defendants in error.

By Court, HUBBELL, J. The plaintiffs in error, who were manufacturers, residing at St. Louis, contracted in September, 1847, to deliver to the defendants in error, who were engaged in the business of mining, in Wisconsin, a pump, "used for pumping water from a lead mine." The pump was delivered at Galena, about the last of October following, and the defendants soon afterwards put it up, in connection with a steam-engine by which it was to be propelled, in their "diggings." The present suit was brought upon a promissory note for about four hundred dollars, balance of the purchase money.

To the declaration a plea of general issue was interposed, with a notice of defects and insufficiencies in the pump, on which the defendants claimed to recoup or reduce the plaintiffs' damages, in the trial. There was no express warranty by the vendors, and the vendees neither returned nor offered to return the article, nor gave any notice of its defects, previous to the suit. The jury found a verdict for the plaintiffs of sixty-six dollars and forty-three cents, and afterwards a motion for a new trial was made and overruled.

To this ruling, and to several matters in the instructions of the court to the jury, exceptions were taken by the plaintiffs. But the bill of exceptions does not show, either at what time they were taken or what was their precise form or substance. It was urged, on the argument, that the points made, on the motion for a new trial, were to be regarded as the substance of the plaintiffs' exceptions or grounds of error. This, however, is a very loose practice. Every exception intended to be relied on in error should be taken and noted at the trial, in conformity to the existing rules of court, and afterwards formally embodied in the bill of exceptions, signed by the judge. Hereafter this court will decline to consider any exception not so taken and brought before it.

The points of the plaintiffs in error, which it is material for the court to examine, arise upon portions of the judge's charge to the jury, to which it is understood that exception was taken. Those portions are as follows: "Where an article is ordered from a manufacturer for a specific purpose, and a sound price is paid for it, the law implies that such article is reasonably fit for the purposes for which it was ordered. In case of breach of warranty, or breach of contract in the sale of chattels, the vendee may retain the article and bring his action upon the warranty, or, if he sued for the stipulated price of the article, he may, to avoid circuitry of action, show such breach of warranty or breach of contract in evidence, in reduction of damages; and the same rule which would apply in an action for breach of warranty or breach of contract would apply on giving such breach in evidence in the action upon the note for the price of the article sold. It is not necessary to the maintenance of an action for breach of warranty, in the sale of personal property, that the plaintiff should have returned or offered to return the property sold. A return or offer must be shown only where the plaintiff disaffirms the contract and seeks to recover back the money or other consideration paid. If, in this case, the jury should find from the

evidence that there was a partial failure of consideration, by reason of the pump being imperfect or not completed in a workman-like manner, then the true criterion of a reduction of damages would be the difference between the value of a pump, completed and executed in a workman-like manner, and the actual value of such a pump as it was delivered to the defendants."

The verdict of the jury, under the pleadings and evidence, must be regarded as conclusive of the fact of defects existing in the pump; in other words, of a partial failure in the consideration of the note.

The substance of the plaintiffs' objections may be resolved into two questions: 1. Was there an implied warranty of the article sold? and, 2. Ought the defendants, within a reasonable time after delivery, to have returned or offered to return the article, or to have given notice of its defects, in order to entitle them to their defense?

The law has been long well settled, both in this country and in England, that on a sale and transfer of goods or chattels which are present and in view of the parties, no warranty of quality will be implied where none is expressly made: *Snell v. Moses*, 1 Johns. 96; *Holden v. Dakin*, 4 Id. 421; *Sands v. Taylor*, 5 Id. 395 [4 Am. Dec. 374]; *Oneida Manf. Soc. v. Lawrence*, 4 Cow. 440; *Bradford v. Manly*, 13 Mass. 139 [7 Am. Dec. 122]; *Hart v. Wright*, 17 Wend. 267; *Howard v. Hoey*, 23 Id. 350 [35 Am. Dec. 572]; *Moses v. Mead*, 1 Denio, 378 [43 Am. Dec. 676]; Chit. Con., 3d Am. ed., 449; 2 Bla. Com. 451; *Laing v. Fidgeon*, 6 Taunt. 108; *Fisher v. Samuda*, 1 Camp. 190; *Chandelor v. Lopus*, Cro. Jac. 4. This is the general rule of the common law upon an executed sale of specific chattels, and rests upon the old adage of *caveat emptor*. But there are several exceptions. One is a sale of provisions, to be used as food: 3 Bla. Com. 165; *Van Bracklin v. Fonda*, 12 Johns. 468 [7 Am. Dec. 339]. Another is where there are fraudulent representations or concealments by the vendor: *Kimball v. Cunningham*, 4 Mass. 504 [3 Am. Dec. 230]; *Hazard v. Irwin*, 18 Pick. 95; *Thayer v. Turner*, 8 Met. 550; 4 Eng. Com. L. 486; *Gardiner v. Gray*, 4 Camp. 144.

Another exception is where there is a sale of goods by sample, in which case, although the bulk of the goods may be present, or within the reach of the parties, the modern authorities generally hold that there is an implied warranty that the article shall agree in substance with the sample: *Parkinson v. Lee*, 2 East, 814; *Parker v. Palmer*, 4 Barn. & Ald. 887; *Waring v.*

Mason, 18 Wend. 425; *Moses v. Mead*, 1 Denio, 386 [43 Am. Dec. 676]; *Rose v. Beatie*, 2 Nott & M. 538.

In *Sands v. Taylor*, 5 Johns. 395 [4 Am. Dec. 374], Spencer, C. J., says: "It has frequently been decided here, that on the sale of a commodity, no action can be sustained for any difference in quality between the thing contracted for and the thing delivered, unless there be fraud or a warranty. I am disposed to confine this rule to the case of a sale where the thing sold is exhibited, and am ready to admit that, on sales by sample, there is an implied warranty that the sample, taken in the usual way, is a fair specimen of the thing sold." In *Oneida Manufacturing Society v. Lawrence*, 4 Cow. 440, which was a sale of cotton by sample, the same doctrine was applied, "though the plaintiff's agent saw the bags in which the cotton was packed." And the learned court of South Carolina had previously decided the same principle in *Rose v. Beatie*, 2 Nott & M. 540.

I think this may be regarded settled law, both in England and America, although in these cases the British judges led the way in a departure from the old rule of the common law, in favor of what has been regarded by distinguished jurists as the more doubtful one of the civil law: *Moses v. Mead*, 1 Denio, 378 [43 Am. Dec. 676]; *Hart v. Wright*, 17 Wend. 267; and remarks of Paige, senator, in *Waring v. Mason*, 18 Id. 439. I do not understand, however, that there has been any attempt to disturb the settled doctrine of *caveat emptor*, nor to establish as law what has been termed the "moral beauty" of the Roman code, *caveat venditor*, but to mark distinctly certain cases which alike reason and policy require to be excepted from the rigidity of the one and the laxity of the other.

But executory contracts, and contracts to furnish articles for a specific purpose, especially by manufacturers, have generally been regarded as resting on a different basis. In such cases there is held to be an implied warranty that the article delivered shall answer the purpose for which it was designed, inasmuch as the parties have no opportunity to inspect it or to decide upon its fitness in the first instance.

Jones v. Bright, 5 Bing. 533, is the leading case in England on this subject, in which nearly all the judges gave their views at length, affirming *Gardiner v. Gray*, 4 Camp. 144, and *Bluett v. Osborne*, 1 Stark. 384, before decided by Lord Ellenborough. *Jones v. Bright* was a contract for copper in sheets. Fisher, a mutual acquaintance of the parties, introduced them to each other, saying to the defendants: "Mr. Jones is in want of

copper for sheathing a vessel, and I have pleasure in recommending him to you, knowing you will sell him a good article." One of the defendants answered: "Your friend may depend on it, we will supply him well." The copper was afterwards selected by the plaintiff's agent, who saw "nothing amiss," and the invoice described the article as "copper for the ship *Isabella*." The plaintiff paid the market price for it, as for copper of the best quality. The ship proceeded on a voyage to Sierra Leone, and the copper, instead of lasting four or five years, the usual duration of copper employed in sheathing vessels, at the end of four or five months greatly corroded, and was unfit for further service. Best, C. J., says: "I wish to put the case on a broad principle. If a man sells an article, he thereby warrants that it is merchantable—that it is fit for some purpose. This was established in *Laing v. Fidgeon*, 6 Taunt. 108. If he sells it for a particular purpose, he thereby warrants it fit for that purpose; and no case has been decided otherwise, although there are doubtless some *dicta* to the contrary." Park, J., observes: "On the case itself I have no doubt, distinguishing, as I do, between the manufacturer of an article and the mere seller." Again: "It has been argued that in all cases there must have been a warranty or a *scienter* and fraud. Perhaps so; but till the cause comes to proof, it can not appear whether the warranty be implied or express; and it will be enough to show that there is an implied warranty from the nature of the dealing between the parties. In the cases referred to, the point has been decided to the full extent that the plaintiff requires in this case. The principal object of attack has been the case of *Gray v. Cox*, 4 Barn. & Cress. 108, where Lord Tenterden said 'that if a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose.' And this is not to be esteemed an *obiter dictum*, because the other judges differ from him. It is his judgment formally given, and goes to support the argument for the plaintiff in this cause.

"In *Fisher v. Samuda*, 1 Camp. 190, the plaintiff had paid for the goods after an action had been brought against him for the price, in which he did not, either in bar or reduction of damages, object to the quality of the goods, so that he may be said to have acquiesced in the defect, and the case has no bearing on the present. In *Laing v. Fidgeon* the rule is laid down in the strongest terms, and no man had more knowledge of commercial law than Chief Justice Gibbs. In *Gardiner v. Gray*, 4 Id. 144, Lord Ellenborough lays down the same rule, and says that the

principle of *caveat emptor* does not apply where the buyer has no opportunity of inspection. It has been argued that the plaintiff had inspection here, but it was merely of the exterior of the commodity, and he had no means of knowing its intrinsic qualities. In *Okell v. Smith*, 1 Stark. 107, it was laid down that the seller is bound to furnish a commodity that will answer the purpose for which it was sold; and Lord Ellenborough said, in *Bluett v. Osborne*, Id. 384, that by selling an article the vendor impliedly warrants it fit for the purpose for which it is sold, and that it is important for the interests of commerce that it should be so. I am therefore clearly of the opinion that the verdict for the plaintiff should stand."

I know of no English case which shakes the principle here established. In our own courts there has been a strong inclination to confine the rule to sales for a specific purpose, where there was an impossibility of inspecting the article.

In *Hart v. Wright*, 17 Wend. 267, the cases are all cited and commented upon by Cowen, J., with his usual ability and research, but the point settled in that case does not conflict with the doctrine that an article sold for a specific purpose must be reasonably fit for the use intended; and in *Howard v. Hoey*, 23 Id. 350 [35 Am. Dec. 572], the same learned judge reviews the cases relating to executory contracts, and not only approves of the English decisions, but concurs with Nelson, C. J., in *Gallagher v. Waring*, 9 Id. 28, that "suitableness enters into every promise to deliver articles of manufacture."

I am clear, therefore, that in the present case, where the plaintiffs, who were manufacturers, undertook to deliver a pump designed for pumping water out of lead mines, there was an implied warranty that, in form and construction, it should be suitable for the purpose intended by the buyers; and the charge of the court on this point was correct.

With respect to the rights of the defendants in this action, it presents the ordinary case of a breach of warranty. The defendants were at liberty, either to bring a separate action to recover their damages for the breach, or to avail themselves of it in the present action, and reduce the damages of the plaintiffs to the value of the chattel sold. On this point also the charge was correct: *Perley v. Balch*, 23 Pick. 283 [34 Am. Dec. 56]; *Borrekins v. Bevan*, 3 Rawle, 23 [23 Am. Dec. 85]; *McAlister v. Reab*, 4 Wend. 483; *Howard v. Hoey*, 23 Id. 350 [35 Am. Dec. 572].

The fact that there was a promissory note raises no barrier to

recoupment. *Batterman v. Pierce*, 3 Hill (N. Y.), 171, was a suit upon a promissory note, and the defense was held good; and the whole doctrine of recoupment is there so ably discussed and so aptly illustrated by Bronson, J., that I need merely refer to it for all the law on the subject. See also *Basten v. Butter*, 7 East, 479; *Germaine v. Burton*, 3 Stark. 32; *Poulton v. Lattimore*, 9 Barn. & Cress. 259. But the omission to set up such a defense would have been treated in a subsequent action of the vendees on a breach of the warranty, as a waiver of their claim for damages: *Fisher v. Samuda*, 1 Camp. 190. I proceed to the last point.

When there is fraud in a sale of chattels, either with or without warranty, it is competent for the vendee to return or offer to return the article sold and recover back his purchase money, because the sale is void in law. This is necessary where he intends to rescind the contract and sue for or defeat the recovery of the whole purchase money. But it is not necessary where he intends to bring suit for the damages merely, by reason of the breach of warranty, or to set up the breach by way of reducing the vendor's recovery: Chit. Con., 5th Am. ed., 458, and cases there cited; *Borrekins v. Bevan*, 3 Rawle, 23 [23 Am. Am. 85]; 2 Stark. Ev. 640, 645; *Miller v. Smith*, 1 Mason, 437; *McAllister v. Reab*, 4 Wend. 483; *Hastings v. Lovering*, 2 Pick. 215 [13 Am. Dec. 420]; *Thornton v. Wynn*, 12 Wheat. 183.

Where there is a warranty, and no fraud, the vendee is not entitled, against the will of the vendor, to return the article and recover back the price paid: *Cary v. Gruman*, 4 Hill (N. Y.), 625 [40 Am. Dec. 299]; *Kase v. John*, 10 Watts, 109 [36 Am. Dec. 148]; *Street v. Blay*, 2 Barn. & Adol. 456. His only remedy is by a suit for damages, or by recoupment, in case of an action for the purchase money. Unless, therefore, in the present case, there was proof of fraud on the part of the vendors—of which none appears—the defendants could not compel them to take back the pump, and there was no occasion for making a useless tender of what the plaintiffs might accept or refuse. Nor was there any necessity of a notice of defects; the notice annexed to the plea was alike sufficient in law and in reason.

The defendants had already paid half the price of a sound article, had spent much time and money in transporting it to their mine and setting it in operation, in connection with other fixtures, and it failed to work well by reason of its improper or imperfect construction. To return it and resort to an action

for the recovery of their money paid would have been but adding to their losses. Yet a notice of its defects to the plaintiffs would have been idle, except to bind them to take it back, which the defendants could not permit, or give the defendants a better claim for returning it, which, as we have seen, the plaintiffs might refuse. But the law required no such notice. The remedy of the defendants consisted in reducing the plaintiffs' demand to the actual value of the article delivered. This was their legal right: *Cary v. Gruman*, 4 Hill (N. Y.), 625 [40 Am. Dec. 299]. And this has been done, not by rescinding the contract, nor by treating it as void for fraud, but by letting in an equitable defense, consistent with the retention of the property and the affirmance of the sale by the vendees.

I am satisfied with the instructions of the court and the verdict of the jury.

Judgment affirmed, with costs.

WARRANTY OF QUALITY NOT IN GENERAL IMPLIED on the sale of goods or chattels: See note to *Emerson v. Brigham*, 6 Am. Dec. 113; *Westmoreland v. Dixon*, 9 Id. 763; *Erwin v. Maxwell*, Id. 602; *Swett v. Colgate*, 11 Id. 266; *Osgood v. Lewis*, 18 Id. 317; *Welsh v. Carter*, 19 Id. 473; *Carnochan v. Gould*, Id. 668; *Hyatt v. Boyle*, 25 Id. 276; *West v. Cunningham*, 33 Id. 300; *Towell v. Gatewood*, Id. 437; *Perley v. Balch*, 34 Id. 56; *Scott v. Renick*, 35 Id. 177; *Kingsbury v. Taylor*, 50 Id. 607. See the principal case cited in *Williams v. Slaughter*, 3 Wis. 360, as pointing out the exceptions to this general rule.

IMPLIED WARRANTY OF QUALITY IN GOODS SOLD FOR DOMESTIC USE: See *Moses v. Mead*, 43 Am. Dec. 676, and note collecting the prior cases in this series.

IMPLIED WARRANTY IN SALE BY SAMPLE: See *Moses v. Mead*, 43 Am. Dec. 676, and note, where the prior cases are collected; *Fraleley v. Bispham*, 51 Id. 486.

IMPLIED WARRANTY OF QUALITY OR FITNESS, WHERE ARTICLE TO BE MANUFACTURED FOR SPECIFIC USE: See note to *Emerson v. Brigham*, 6 Am. Dec. 115; *Bunton v. Davis*, 44 Id. 769. In *Ricketts v. Sisson*, 35 Id. 141, it was held that the manufacturer of an article, according to specifications furnished, did not impliedly warrant its fitness for the purpose intended. The principal case was distinguished in *Locke v. Williamson*, 40 Wis. 381, on the ground that in the former the defect in the article manufactured or furnished for a particular use was latent, and could be discovered only after trial; while in the latter it was held that where a purchaser of goods, with full knowledge, or with full opportunity for examination and knowledge, of their defects, which are patent, takes possession without notifying the vendor, at the time of receiving them, or within a reasonable time afterwards, that they are not accepted, he can not recoup damages for such defects in an action for the price.

IMPLIED WARRANTY IN EXECUTORY CONTRACTS OF SALE IN GENERAL See *Howard v. Hoey*, 35 Am. Dec. 572, and note thereto.

VENDEE'S REMEDIES FOR BREACH OF WARRANTY OF QUALITY.—The principal case is cited and commented upon at length by Mr. Chief Justice Dixon in *Fisk v. Tank*, 12 Wis. 302, and the following points were said to be decided by it: "1. That in executory contracts to furnish articles for a specific purpose, especially by manufacturers, there is an implied warranty that the article delivered shall answer the purpose for which it was designed, inasmuch as the purchaser has not an opportunity of inspecting or testing it; 2. That in case of a warranty, direct or implied, where the article purchased proves defective or unfit for the use intended, the purchaser may, without returning or offering to return it, and without notifying the vendor of its defects, bring his action for the recovery of damages, or if sued for the price, may set up and have such damages allowed to him by way of recoupment from the sum stipulated to be paid. These points were fairly raised, and, as we think, correctly decided. There was another point, however, not involved in the case, upon which the court attempted to rule, to which we do not wish to give our unqualified assent. It was said that where there is a warranty but no fraud, the vendee is not entitled, against the will of the vendor, to return the article and recover back the price paid; that in such case his only remedy is by suit for damages, or by recoupment in case he is sued for the purchase money. As applied to the facts of that case, provided the court had been called upon to determine whether the defendants had the right, at the time the action was commenced, to return the pump about which the suit arose, such decision might have been correct. There is, however, much reason for saying, and many respectable authorities hold, in respect to executory contracts particularly, that in addition to the remedies above stated, the vendee may, in case the warranty be not complied with, altogether refuse to receive the article; or may take and keep it for such time only as may be necessary for a fair examination, and then return it on discovering its defects; in which case he is not considered as having received it at all; and in either case, if he has paid for the same, may sue for and recover back the price: See note to *Cutter v. Powell*, 2 Sm. L. C., 5th ed., 32, and cases there cited. Upon this point we wish to express no opinion. We desire merely to reserve it. It was entirely outside of the case then before the court, and is equally so now; and therefore could not be adjudicated in either." And see *Warder v. Fisher*, 48 Wis. 342, citing the principal case. In regard to the vendee's right to set up a breach of warranty when sued for the price, see, further, *Steigleman v. Jeffries*, 7 Am. Dec. 626; *McAlpin v. Lee*, 30 Id. 609; *Perley v. Balch*, 34 Id. 56; *Mixer v. Coburn*, 45 Id. 230; *Harman v. Sanderson*, Id. 272; *McCorkle v. Doby*, 47 Id. 560; and *Walton v. Cody*, 1 Wis. 431, citing the principal case. And this defense may be set up, or an action maintained on the warranty, without returning or offer to return the article, or giving the vendor notice to take it away, or of its defects: *Steigleman v. Jeffries*, 7 Am. Dec. 626; *Borrekins v. Bevan*, 23 Id. 85; *Boorman v. Jenkins*, 27 Id. 158; and *Bonnell v. Jacobs*, 36 Wis. 63, citing the principal case. But to rescind a contract of purchase, the vendee must return the property, unless it be entirely worthless to both parties: *Perley v. Balch*, 34 Am. Dec. 56; and see *Fowler v. Williams*, 4 Id. 579, as to the necessity of giving notice of rescision. As to the right to rescind the contract for a breach of warranty, there is some conflict of opinion: See *Rutter v. Blake*, 3 Id. 550; note to *Bradford v. Manly*, 7 Id. 131; *Steigleman v. Jeffries*, Id. 626; *Howard v. Hoey*, 35 Id. 572; *Kase v. John*, 36 Id. 148; *Voorhees v. Earl*, 38 Id. 588.

BENAWAY v. BOND.

[2 PINNEY, 449; 2 CHANDLER, 110.]

JUSTICE'S JUDGMENT MUST BE AUTHENTICATED BY SOME RECORD, and no effect can be given to one never actually entered.

ASSUMPSIT on a promissory note, and verdict and judgment for the plaintiff for the amount of the note. The facts are stated in the opinion.

A. Hyatt Smith, for the plaintiff in error.

J. A. Sleeper, for the defendant in error.

By Court, Stow, C. J. This was a suit upon a promissory note admitted to have been made by Benaway, the defendant below. The defense was a former recovery. In support of his plea, the defendant called as a witness William F. Tompkins, who testified that previous to the commencement of this suit a cause was tried before him, as a justice of the peace, between these parties, in which Bond "put the note in evidence as an offset, and such an adjudication was therein had that judgment was rendered and declared in court for the defendant for about the sum of fourteen dollars; that he, the justice, never made any entry of the judgment in his docket, but at the time of the rendition of the judgment made a minute of the amount on a piece of paper, and being himself unwell, delivered, as he supposed, the minute to one Prichard, to make the record on the docket; that since that time he had not seen the minute, though he had searched for it." This testimony was objected to, and finally ruled out by the circuit judge, on the ground that the judgment could be proved only by the docket, or a transcript of it.

Though the amount in controversy is very small, the principle involved in this case is of considerable moment, and it is important that it should be settled; and hence we have given the subject the most careful attention, and examined critically all the numerous authorities to which we have been referred, and the result of our investigation is, that the circuit judge decided correctly, and that the judgment should be affirmed.

The books—that is the American state reports—are full of cases growing out of justices' judgments, and the questions which they have occasioned, What is a justice's judgment? When and how is it rendered? and, How can it be proved? are almost innumerable; while the responses of the courts have become in a measure oracular, from their never-ending con-

traditions. And yet it is singular that amid all this confusion and looseness no one case has been found where effect has been given to a justice's judgment never actually entered. Judgments recorded long after the expiration of the time provided by the statute, even years after the justice had gone out of office, and those written on loose sheets of paper, have been held valid; but some record, the docket or other written evidence, has in all instances, as far as I can discover, been held indispensable to their authentication. We think it would be unsafe and unwarranted in us to dispense with this proof, certainly not in the case before us. The justice, no doubt, made a decision, but by his negligence in not entering it in his docket, and by the negligence of the party who desires to avail himself of it in not procuring it to be so entered, there is no legal evidence of its existence as a judgment; nor does any such state of things appear as to dispense with this proof. The accident that the magistrate happened at the time to be unwell, and gave his memorandum to his clerk, is no excuse for not having the judgment docketed afterwards.

Judgment affirmed.

FORMAL ENTRY OF JUSTICE'S JUDGMENT MAY BE MADE AT ANY TIME: *Hall v. Tuttle*, 40 Am. Dec. 382, and note; note to *Sibley v. Howard*, 45 Id. 449.

JUSTICE'S FAILURE TO ENTER AND MANNER OF ENTERING JUDGMENT: See *Freeman on Judgments*, secs. 53-55.

CARSON v. ALLEN.

[2 PINNEY, 457; 2 CHANDLER, 123.]

GARNISHEE NOT LIABLE unless it appears that he had "property, credits, or effects" in his possession belonging to the defendant in the attachment suit, or was "indebted" to him.

MAKERS OF PROMISSORY NOTE NOT LIABLE UNDER GARNISHEE PROCESS when the note is not due, and not shown to be owned by or in the possession of the attachment debtor at the time of serving the garnishee process.

PROCEEDINGS growing out of an attachment sued out against one Wales. The plaintiff in error had been summoned as garnishee, and disclosed that before being summoned he and his partner Eaton had made to Wales their promissory note for one thousand one hundred dollars, in the firm name, which note had not become due at the time of serving the garnishment process. Judgment by default was taken against Wales. A *scire*

facias was afterwards issued against the plaintiff in error and Eaton, as partners, and personally served upon the latter, and upon the former by copy left with the latter, without saying that it was left "at his last and usual place of abode." Judgment was rendered against the plaintiff in error for the amount of the judgment against Wales, and for costs.

B. C. Eastman, for the plaintiff in error.

J. H. Knowlton, for the defendant in error.

By Court, HUBBELL, J. The plaintiff in error was summoned as a garnishee, and appeared and answered that he and his partner, Eaton, had given a negotiable promissory note to Wales, the defendant in the attachment suit, which was not then due; that the note had been made negotiable to enable Wales to turn it out to his creditors, and that no demand of payment had been made of the makers. No evidence was given showing that the note, at the time of serving the garnishment process, was owned by Wales, or was in his possession.

To render the garnishee liable, it must appear that he had in his possession "property, credits, or effects" belonging to Wales, the defendant in the attachment suit, or was "indebted" to him. There was no evidence of property, credits, or indebtedness other than the note made by Carson & Eaton; and waiving the question whether that note could form the subject of attachment in a suit against Carson alone, it is clear that it was evidence of indebtedness only to the indorsee or bearer, whoever he might be. The note, being negotiable, was liable to be transferred from hand to hand, until due, and each subsequent holder would gain a perfect right of action against the makers.

Holding the makers liable under the garnishment process, before the maturity of the note, would subject them to pay it twice over, or would defeat the action of the real owner. We must not so construe the statute relating to attachments as to defeat the long-established rules of the law merchant. That law, which gives currency and character to negotiable paper, has been incorporated into the statutes of Wisconsin, and is deemed of salutary effect in the general business of the community.

Because, therefore, the answer of the plaintiff in error did not disclose any indebtedness to the defendant Wales, nor disclose any property, credits, or effects belonging to him in the possession of the garnishee, the judgment of the circuit court was erroneous. Whether a negotiable promissory note, past due, may not be the subject of attachment as credit or indebtedness

in the hands of the maker, it is not necessary now to decide. Nor is it necessary to pass upon several other points in the case presented by the plaintiff in error.

Judgment reversed, with costs.

DEFENSES TO WHICH GARNISHEE IS ENTITLED: See *Mathis v. Clark*, 12 Am. Dec. 688; *Hanna's Syndics v. Loring*, 13 Id. 339; *Farmers' and Mechanics' Bank v. Little*, 42 Id. 293.

MAKER OF NEGOTIABLE INSTRUMENT, WHETHER MAY BE GARNISHED: In *Skinner v. Moore*, 30 Am. Dec. 155, 165, and in *Cottrell v. Varnum*, 39 Id. 323, it was held that the maker of a negotiable note could be garnished; but it is apparent from the examination of these cases, especially the first, that the notes were still in the hands of defendants, who were the holders of the same; while in *Sheets v. Culver*, 33 Id. 593, it was held that a negotiable note to the defendant, as payee, can not be attached in the hands of the maker as a debt due the defendant from him, after it has been put in circulation; and see *Erwin v. Commercial and Railroad Bank*, 48 Id. 447.

STATE v. McCARTY.

[2 PINNEY, 513; 2 CHANDLER, 199.]

INDICTMENTS CAN NOT BE AMENDED, but a caption is no part of an indictment. CAPTION TO INDICTMENT NEED NOT STATE AT LENGTH the qualifications of the grand jurors, nor recite all the facts which give the court jurisdiction, when the court in which the indictment is found is one of general criminal jurisdiction.

AMENDMENTS TO CAPTION OF INDICTMENT furnish no reason for arresting judgment, where the indictment was good in every respect before the amendments, and their allowance did not prejudice the defendant.

CERTIFIED case, which came into the court on the certificate and report of a circuit judge, to be advised in accordance with the statute. The opinion states the facts.

S. R. Cotton, for McCarty.

C. James, for the state.

By Court, WHITON, J. This case comes up on the report of the circuit judge before whom the cause was tried. The defendant was indicted for murder.

The indictment charging the offense commences as follows: "State of Wisconsin, Circuit County of Brown, ss. Of October term, in the year of our Lord one thousand eight hundred and forty-nine. The jurors of the grand jury for the state of Wisconsin, inquiring in and for the county of Brown aforesaid, being duly tried, impaneled, and sworn, do, upon their said oaths, present," etc.

After the defendant had pleaded to the indictment, the dis-

trict attorney moved to amend it, by inserting after the words "state of Wisconsin," in the second line, the words "good and lawful men of the county aforesaid," and also after the word "aforesaid," at the end of the third line, the words "at the October term of said circuit court, begun and holden at Green Bay, in the said county, on the first Monday of October, in the year of our Lord one thousand eight hundred and forty-nine." The amendments were allowed by the court, and the jury having found the defendant guilty, the judge being in doubt as to the correctness of his ruling, certified the case to this court in accordance with the statute.

If the amendments were at all material, their allowance would be good cause for arresting the judgment. Indictments can not be amended. But the amendments allowed were to the caption, and that is no part of the indictment: 1 Ch. Crim. L. 326; *The People v. Jewett*, 3 Wend. 319. And we are satisfied that in this case the caption was correct as it stood before the amendments were allowed. It is not necessary to state at length, in the caption to an indictment, the qualifications of the grand jurors, nor to recite all the facts which give the court jurisdiction, when the court in which the indictment is found is a court of general criminal jurisdiction: *Turns v. Commonwealth*, 6 Met. 224. In this case, as the indictment was in all respects good before the amendments were allowed, and as their allowance did not prejudice the defendant on his trial, we see no reason for arresting the judgment.

CAPTION IS NO PART OF INDICTMENT: *Territory v. McFarlane*, 5 Am. Dec. 706.

AMENDMENTS OF CAPTION.—The statement in an indictment that the presentment of the jury is "upon their oaths," is a part of the caption, and if it has been omitted may be inserted even after conviction: *State v. Creight*, 2 Am. Dec. 656; and as to amending captions in general, see *Id.*, note. The caption to an indictment may be amended in the supreme court of New Jersey after its removal thereto by *certiorari*, upon proof of the necessary facts, or it may be sent back to the lower court, there to be amended from the record: *State v. Jones*, 17 Id. 483.

CAPTION TO INDICTMENT, WHAT MUST STATE.—An omission in the caption to state the place where the court was holden, the indictment found, or that the grand jury were drawn from the county where the offense was committed, is fatal to its validity: *Carpenter v. State*, 34 Am. Dec. 116; but a caption need not show that the members of the grand jury were summoned and returned as such: *State v. Jones*, 17 Id. 483; nor need the name of the judge who held the court at the term when the indictment was found appear; if it sufficiently appear before what court the prisoner was charged, and that the indictment was presented by a competent grand jury, which was duly summoned, impaneled, and sworn, it is enough: *Hogan v. State*, 30 Wis. 433, citing the principal case.

HOW v. KANE.

[2 PINNEY, 531; 2 CHANDLER, 222.]

TERRITORIAL COURTS OF WISCONSIN WERE IN EXISTENCE, and judgments could be rendered by them, after the adoption of the state constitution, and before its approval by congress and admission of the territory as a state.

IRREGULARITY IN THAT EXECUTIONS ON WHICH BILL IN NATURE OF CREDITOR'S SUIT IS FOUNDED were returnable out of term, without an order first obtained for that purpose, will not be noticed by the supreme court; application should be made to the court from which they issued to set them aside.

PARTNERSHIP PROPERTY IS AS MUCH LIABLE TO JUDGMENTS FOR INDIVIDUAL as for partnership debts of the only ostensible partner.

PARTNERSHIP PROPERTY RECEIVED BY DORMANT FROM OSTENSIBLE PARTNER is subject to judgments against the latter alone, and the dormant partner is bound to disclose and account for it, and may be restrained from disposing of it in the mean time.

DORMANT PARTNER IS NOT PERSONALLY LIABLE for the payment of judgments against the ostensible partner alone.

APPEAL from a decision overruling a demurrer to the complainants' bill. The facts are stated in the opinion.

E. G. Ryan and J. Holliday, for the defendant and appellant.

D. H. Chandler and H. S. Orton, for the complainants.

By Court, STOW, C. J. Did the bill in this case depend upon its name, or any name, it would be difficult to sustain it. It is not technically a creditor's bill. The complainant's counsel, in answer to an inquiry from the bench, says that it is not a bill in aid of an execution. And as far as it seeks to subject the defendant Kane personally to a decree for the payment of the judgments against his partner Cogswell, it is clear that it can not be supported. Yet, taken altogether, rejecting a good deal of the stating and charging part as impertinent, and denying the principal relief sought, we are of opinion that the bill should be sustained as to the discovery, and as to some portion of the relief which it seeks.

The bill was filed by the complainants, How and eight others, judgment creditors of the defendant Cogswell, in behalf of themselves and all other judgment creditors of Cogswell. It states that the defendants were partners in mercantile business, and that their partnership commenced in 1844; that Cogswell was the active and only ostensible partner; that the debts on which the judgments were obtained were contracted on account of the partnership, and in the way of its business; and that executions have been issued on the judg-

ments, and returned unsatisfied. It further states that in 1846 Cogswell ceased to be the active and ostensible partner, Kane becoming such; the business of the concern, however, continuing the same as before; that at about that time Cogswell, pretending to be insolvent, and being in dread of attachments against him, transferred, or pretended to transfer, all his interest in the concern to Kane, receiving therefor a consideration which is alleged to have been merely nominal, and that this transfer was made on the eve of attachments against Cogswell for partnership debts, being about to be levied on the partnership property; that this property, or the avails of it, is now in the hands of Kane, and is in equity liable to the payment of the judgments, and the bill seeks to subject it to that purpose. The bill also claims that Kane, having been originally liable with Cogswell as a partner, for the consideration of all the judgments, and having now in his possession all the assets of the copartnership, is personally liable to a decree for the amount of the debts, and which decree, among other things, it prays.

This bill has been taken as confessed against Cogswell. Kane has demurred, and has assigned as special causes of demurrer:

1, 2. That the writs of *fieri facias* on the several judgments were not returnable of the first day of any term of court, nor were allowed by any order of the judge, to be made returnable on the days on which they were returnable, nor were returnable on any day which by law they could be made returnable without such order, and that they were therefore void.

3. That the bill sets up that the defendant Kane was Cogswell's partner, and jointly liable with him to the complainants at the time of the accruing of the indebtedness, and of the recovery of the judgments, and that therefore the complainants have a complete remedy at law, and consequently none in equity.

4. General want of equity in the bill.

Several other causes of demurrer have been assigned, or have been attempted to be assigned, *ore tenus*, on the argument of the appeal.

For the understanding of this demurrer, it is necessary to refer to the bill more particularly than has been done in the general summary already given. It states that all the judgments, except that in favor of the complainants Van Buren and Churchill, were obtained in the Milwaukee county circuit court, on the third day of September, 1849, and on which writs of *fieri facias* were issued the fifth of that month, returnable the eighth. And

that the judgment in favor of Van Buren and Churchill was obtained in the late territorial district court of Milwaukee county, the eleventh of May, 1848, and on which a *fiery facias* issued September 20, 1849, returnable the next day.

To this last judgment the objection is interposed, *ore tenus*, that at the time of its rendition, May 11, 1848, there was in fact no territorial district court of Milwaukee county—the territorial government, with all its machinery and incidents, having been abrogated by the adoption by the people of the state constitution, in March preceding, and that therefore the judgment is absolutely void, as being *coram non judice*.

It is to be borne in mind that though our state constitution was voted upon and adopted by our people in March, 1848, it was not sanctioned by congress, and the territory admitted into the Union as a state, until the twentieth of May following.

The objection to this judgment of Van Buren and Churchill raises the question, whether the adoption by our people of their state constitution did, in fact, of itself, abrogate the territorial government, and thus *ipso facto* constitute us a state; or whether that political change was affected only by congress sanctioning our constitution and admitting us into the Union.

This is a subject which is now convulsing the nation, but it is one on which I do not entertain, and never have had, a doubt. I know no wilder or worse political or legal heresy, than this new-fangled doctrine of a territory constituting itself a state, and being, at the same time, within and without the nation. The proposition involves a confusion of ideas, and can not be expressed without a solecism in terms. Could such a thing be conceived and be carried into actual practice, it would be attended with the worst confusion and the most disastrous results; first anarchy, and then the destruction of the federal constitution. By no means intending any disrespect to the very able and candid counsel who have argued for the defendant, I can not countenance, even by an argumentative denial, any such doctrine. It is of the same school and involves the same principles as that of the right of secession—in plain, but bad English, the right of nullification—a doctrine which has but few disciples in our country, and none where free air is breathed; and of the two, I think it the worst. Politicians, even such as approach the grade of statesmen, may assert this doctrine, and pretend to believe it, and “convincing others, half convince themselves;” but no American judge, sensible of the obligations of his oath, and of his duty to our whole country, can give it any sanction. In

our political system a territory can become a state only by the action and assent of the national government, and there is not, and can not be, any such thing as an American state outside the federal Union. With us, and probably with no people or government, is a claim of protection, equality, and fraternity recognized which is accompanied with a disclaimer of dependence, obligation, and allegiance.

Our territorial courts and all the other machinery of our territorial government were in the full legal and effective exercise of their appropriate functions, until, on the twenty-ninth of May, 1848, the United States congress, by approving of our constitution and admitting us into the Union, emancipated us from provincial pupillage, and made Wisconsin an integral part of the American republic.

We therefore hold that Van Buren and Churchill's judgment, as far as the objection of want of jurisdiction in the district court is concerned, was valid, and that all judgments obtained in the territorial district courts up to May 29, 1848, if in other respects unobjectionable, are also valid. What may be the virtue and condition of judgments obtained during the interregnum between that time and the twenty-eighth of August, when the circuits went into operation, it is not necessary nor is it proper to decide.

The first cause of demurrer assigned on the record is, that the executions were returnable out of term, without an order having been first obtained from the judge for that purpose, as required by the statute. Waiving the objection that this demurrer is speaking, in setting up matter not contained in the bill, the answer is, that this court can not take notice of such an irregularity: *Williams v. Hogeboom*, 8 Paige, 469. The executions were not void, but at most voidable; and the proper course for the defendant, if he wished to be relieved from them, was to have applied to the court from which they issued to set them aside.

A further cause of demurrer was attempted to be assigned here, though not in the court below, that the judgment in favor of the complainants, West, Oliver, and Charles, does not appear from the bill to have been founded on a partnership debt. Without deciding whether a demurrer, *ore tenus*, not resorted to on the argument below, can be entertained here on appeal, we think, taking the whole context of the bill, that this debt is in fact stated to have been that of the partnership. But whether this be so or not is immaterial, as we are of opinion that the whole

of the partnership property, if liable at all, is as much liable to judgments against Cogswell, the only ostensible partner, for his individual as for his copartnership indebtedness. And this brings me to the consideration of the only question of principle (except that of the jurisdiction of the late district courts) involved in this case; and that is, Is the property belonging to two partners (one of whom is dormant and unknown), in their copartnership capacity, liable on a judgment against the visible partner?

It is remarkable that upon a question like this, and which commercial transactions must or might have often given rise to, but little authority is to be found. The general doctrine no doubt is, that personal property in the possession and subject to the control of the debtor, and of which he is the ostensible owner, is liable for his debts. This rule, it is true, is subject to many exceptions, some by the lenity and policy of the common law, and more by fraudulent legislation; but among these exceptions I am not aware that the latent right of a dormant partner is one. To say nothing of the original character of the debt, whether it may have been in fact contracted as a private one, or on account of the partnership, and in the course of its business, such a withdrawing from process of the debtor's property, or of that of which he was the apparent owner, and on the faith of which it may be presumed the credit was acquired, is not permitted either by the common law or by any statute. It is a palpable fraud; and though by common-law process the creditor may have redress by selling the property, and contesting the legal right in a subsequent action, yet, where the parties confederate and have involved it in such disguise and confusion that an execution can not readily reach it, I can conceive of no possible objection to a court of equity lending its aid. It is the right of the creditor to invoke that aid, and the duty of the court to grant it.

Now what is this case? The defendants, Cogswell and Kane, form a partnership in 1844 (I lay out of view all badges of fraud in the inception of the partnership, the motives for Kane's being kept in the background, and the roguish correspondence appended to and made part of the bill), by which they engage in mercantile business, Cogswell to be the known and ostensible partner, and Kane the secret and unknown one, the business to be conducted in the name of Cogswell alone, but for the equal and joint benefit of both. Under this arrangement they continue in business for years, the ostensible partner con-

tracting large debts in his own name, but for the benefit of the partnership, among which debts are the judgments, to enforce the collection of which this bill is filed. After these debts, or some of them, had become due, and attachments had been issued against Cogswell, and were about being levied, he transfers or attempts to transfer, the whole of the partnership property in his possession to his secret partner, Kane, without any consideration, or any actual change in their relations, as a mere maneuver to defraud, hinder, and delay their creditors by making Kane, instead of Cogswell, the ostensible owner and active partner. Judgments are obtained against Cogswell; executions—the validity of which for the purpose of this bill, we have already seen, is not to be called in question—are issued, and the sheriff, finding no property in the hands of Cogswell, returns them *nulla bona*. The specific property transferred by Cogswell, or its avails and equivalent in the shape of real estate, it is alleged is still in the hands of Kane.

The question then recurs, Is this property, thus situated, subject in equity to the judgments against Cogswell? We think it is.

In the case of *French v. Chase*, 6 Greenl. 166, Chief Justice Mellen held, that the prior right of a partnership creditor to be paid out of the common property, in preference to the separate creditor of the ostensible partner, did not exist in case of a dormant partnership, and that in such a case the whole of the partnership property in the hands of the ostensible partner was liable for his individual debts. This doctrine, in the absence of conflicting or overruling authority—and it is difficult to conceive how there can be any—we regard as the law, and we give it our unqualified sanction.

This view of the subject disposes of the objection so confidently asserted, that a court of equity can not go behind the judgment at law and inquire into its consideration. For, as has been already observed, it is wholly immaterial whether the debt was contracted by the ostensible partner in his partnership or individual capacity. And here I may remark, that the proposition that you can not go behind the judgment and inquire into its consideration is subject to many qualifications and exceptions. Cases arising under our insolvent and exemption laws are familiar and in point.

We therefore hold, that the circuit was right in deciding that Kane was bound to disclose and account for so much of the partnership property and its avails in his hands, as was formerly

in the possession of Cogswell, while acting as the ostensible partner. And that in the mean time it was proper he should be restrained by injunction from disposing of it.

It has already been observed, that as far as the bill seeks to subject the defendant Kane, personally, to a decree for payment of the judgments against Cogswell, it can not be sustained. The complainants, having elected to pursue Cogswell alone at law, and having merged their claims against the partnership in judgments against him alone, can not now fall back upon a court of equity for the purpose of asserting their original right. The law on this subject is too well settled to be called in question at this day: *Smith v. Black*, 9 Serg. & R. 142 [11 Am. Dec. 686]. And so are all the authorities, with one solitary exception, and that is the case of *Sheehy v. Mandeville*, 6 Cranch, 253. That case, great and deserved as are the respect and deference of the whole American bar and bench for the late illustrious chief justice of the United States, has never been regarded as law. It is one of the few—the very few—instances in which that great judge erred.

One ground of the appeal is, that the defendant should not have been ordered to answer fully. It is almost always as a mere favor that a party demurring, and whose demurrer has been in the whole overruled, is allowed to answer at all; and it is a matter of discretion with the court to impose such terms as the circumstances of the case may seem to warrant.

The decree of the circuit court must be affirmed with costs.

Decree affirmed.

RIGHTS OF FIRM AND INDIVIDUAL CREDITORS: See *Buchan v. Sumner*, 47 Am. Dec. 305; *Kirby v. Schoonmaker*, 49 Id. 160, and cases in notes thereto.

DORMANT PARTNER NEED NOT BE JOINED by the ostensible partner in an action upon a contract entered into in his own name: *Goble v. Gale*, 41 Am. Dec. 219; *Hilliker v. Loop*, 26 Id. 286; *Desha v. Holland*, 46 Id. 261.

STRANGER CAN NOT OBJECT TO MERE IRREGULARITY IN ISSUING EXECUTION: *Swiggart v. Harber*, 39 Am. Dec. 418; *Lowber & Wilmer's Appeal*, 42 Id. 302.

HAZELTON v. PUTNAM.

[3 PINNEY, 107; 3 CHANDLER, 117.]

EASEMENT IS LIBERTY, PRIVILEGE, OR ADVANTAGE IN LAND, without profit, and existing distinct from the ownership of the soil, and must be founded upon a deed or writing, or upon prescription. It is a permanent interest in another's land, with a right to enjoy it fully and without obstruction.

LICENSE IS BARE AUTHORITY TO DO CERTAIN ACT or series of acts upon another's land, without possessing any estate therein, and is not assignable, and is gone if the owner of the land transfers his title to another, or if either party die.

PAROL LICENSE WHILE EXECUTORY MAY BE REVOKED AT PLEASURE, but when executed, it can not be so revoked as to make the licensee a trespasser, and the acts done under it tortious.

PAROL LICENSE GIVES NO INDEFEASIBLE POWER OR AUTHORITY to exercise a continuing privilege on another's land, even when carried into execution, and upheld by acts done *in pais* in accordance with its terms.

LICENSEE MAKING IMPROVEMENTS OR EXPENDITURES ON FAITH OF PAROL LICENSE may have equitable interposition, at all events so far as to restrain their appropriation by the licensor, without first placing the licensee in the same position in which he stood before the execution of the license.

PART PERFORMANCE OF AGREEMENT FOR EASEMENT, AND EXECUTION OF PAROL LICENSE, take such agreement and license out of the statute of frauds.

PAROL AGREEMENT PART PERFORMED OR EXECUTED WILL NOT BE SPECIFICALLY ENFORCED, unless the contract be established by competent proofs to be clear, definite, and unequivocal in all its terms.

BILL in equity praying for an injunction against certain wrongful acts of the defendant, and asking that he be compelled to convey a privilege of flowing his land, as he had verbally promised to do. The circuit court granted the relief desired, and the defendant appealed. The material allegations of the bill and answer are given in the opinion.

Smith and Palmer, for the appellant.

J. E. Arnold, for the appellees.

By Court, JACKSON, J. This is an appeal from the Milwaukee county circuit court. The complainants below, and the appellees in this court, Amos Putnam and Aaron Putnam, allege that in the month of April, 1840, the appellant, Orrin Hazelton, by parol, consented and permitted complainants, Putnams, to build a saw-mill and erect a dam upon their land in such a manner as to flow water upon the land of appellant; and did also by parol, consent and permit and agree, that complainants should cut a race across the lands of the appellant for the purpose, and in such a manner as to divert the waters of Stickney run from its usual channel, and flow the same into the dam or pond of said complainants for the use of said mill, and also promised to confirm this privilege or grant by deed; that upon and after the giving of such consent and the making of such promise, and on the faith thereof, complainants proceeded to make improvements and build their saw-mill, and prior to

the third day of August, 1840, expended several hundred dollars upon said works; that after that time, the appellant Hazelton, repenting of his license and promise, attempted to revoke, and refused to confirm the same by deed; and subsequently interrupted the complainants in the enjoyment of said privileges, and prevented them from availing themselves of the benefit of the waters of Stickney's brook, by erecting a mill, and diverting them thereto, to the exclusion of complainants.

The respondent Hazelton, in his answer to complainants' bill, denies having given the license and permission in the manner and to the extent alleged; and insists that any permission or license that may have been given was revoked before the complainants had expended or invested one dollar in building their mill, or constructing either of their races.

To sustain the allegations in the complainants' bill on the one hand, and to support the answer of the respondent on the other, a large number of witnesses were sworn and examined, whose testimony was read upon the hearing of the cause below, and is now upon appeal presented to the consideration of this court.

Parol licenses, especially in cases at law, have been most fruitful sources of litigation, and have given rise to decisions so contradictory, both in the English and American courts, as to render somewhat applicable the remark made by Lord Abinger, in *Rodwell v. Phillips*, 9 Mee. & W. 505, in relation to decisions upon a kindred branch of the law, that "no general rule is laid down in any of them that is not contradicted by some others."

It is quite probable that much of this discrepancy may have arisen from the different ideas attached to the word "license:" *Mumford v. Whitney*, 15 Wend. 392 [30 Am. Dec. 60]; for, as was said by Baron Alderson, in his elaborate opinion in *Wood v. Leadbitter*, 13 Mee. & W. 837, "that which is called a license is often something more than a license; it often comprises or is connected with a grant, and then the party who has given it can not in general revoke it, so as to defeat his grant to which it was incident."

At the present day, the distinction between an easement and a license is well settled and fully recognized, although it becomes difficult, says Chancellor Kent, "in some of the cases to discover a substantial difference between them." "An easement," says Mr. Angell, in his able treatise on watercourses, 316, "it has appeared, is a liberty, privilege, or advantage in land, without profit, and existing distinct from the ownership of the

soil; and it has appeared also that a claim for an easement must be founded upon a deed or writing, or upon prescription, which supposes one. It is a permanent interest in another's land, with a right to enjoy it fully and without obstruction. A license, on the other hand, is a bare authority to do a certain act or series of acts upon another's land, without possessing any estate therein; and it being founded in personal confidence, it is not assignable, and it is gone if the owner of the land who gives the license transfers his title to another, or if either party die."

This definition of a license, as well as of an easement, is adopted by Chancellor Kent, 3 Kent's Com. 452, and is expressly recognized by the most approved English and American authorities: *Thompson v. Gregory*, 4 Johns. 81 [4 Am. Dec. 255]; *Mumford v. Whitney*, 15 Wend. 380 [30 Am. Dec. 60]; *Cook v. Stearns*, 11 Mass. 533; *Miller v. Auburn & Syracuse R. R. Co.*, 6 Hill, 61; *Fitch v. Seymour*, 9 Met. 462; *Hays v. Richardson*, 1 Gill & J. 366; *Fentiman v. Smith*, 4 East, 109; *Hewlins v. Shippam*, 5 Barn. & Cress. 221; *Thomas v. Sorrell*, Vaugh. 351; *Wood v. Leadbitter*, 13 Mee. & W. 843.

Whilst it has been uniformly held that a parol license, while it remains executory, may be revoked at pleasure: *Cook v. Stearns*, 11 Mass. 533; *Mumford v. Whitney*, 15 Wend. 380 [30 Am. Dec. 60]; *Fentiman v. Smith*, 4 East, 109; Angell on Watercourses, 319, 324; yet, when executed, whether it is revocable, and if so, how far and to what extent, has been a question fraught with much difficulty, and respecting which different courts of the highest respectability have held very differently.

The principal English cases that have been relied upon in support of the doctrine that there are some parol licenses which are irrevocable, are those of *Web v. Paternoster*, Palm. 71; *Wood v. Lake*, 1 Say. 3; *Taylor v. Waters*, 7 Taunt. 374; *Winter v. Brockwell*, 8 East, 308.

The cases of *Wood v. Lake* and *Taylor v. Waters* appear to have been decided on the ground of the decision in *Web v. Paternoster*. The case of *Winter v. Brockwell* is distinguishable in its main feature from the three other cases. The declaration in that case stated that the plaintiff "was entitled to an easement of a passage for light and air to his dwelling-house, through an ancient window, over an open space of land of the defendant, and that by means of such open space, noisome smells from the defendant's house evaporated without occasioning any nuisance to the occupier of the plaintiff's house, and that the defendant wrongfully erected a sky-light above the plaintiff's ancient win-

dow, and covering the open space above mentioned, by means of which the light and air were prevented entering the plaintiff's window and into the house, and noisome smells arising from the adjoining house were prevented from evaporating, and entered the plaintiff's dwelling-house." The defendant pleaded the general issue. It appeared in evidence that "the open space which belonged to the defendant's house had been inclosed and covered by a sky-light in the manner stated, with the express consent and approbation of the plaintiff, obtained before the inclosure was made, who also gave leave to have part of the frame-work nailed against the wall. Some time after it was finished, the plaintiff objected to it, and gave notice to have it removed; but Lord Ellenborough was of opinion that the license given by the plaintiff to erect the sky-light, having been acted upon by the defendant and the expense incurred, could not be recalled and the defendant made a wrong-doer; at least, not without putting him in the same situation as before, by offering to pay all the expenses which had been incurred in consequence of it. And under this direction the defendant obtained a verdict."

Mr. Angell, Angell on Watercourses, sec. 313, draws a very clear and obvious distinction between the case of *Winter v. Brockwell*, 8 East, 308, and some of the other cases referred to; and says: "In the case of a prescriptive right to light, as in the case of *Winter v. Brockwell*, it is not in collision with well-established authority, but, on the other hand, in accordance with it, that a parol license to do any act on the land of the licensee by the licensor, inconsistent with and in derogation of said right, is irrevocable, because the title to this right of the licensor becomes thus extinguished. An easement is not created, but an existing one voluntarily abandoned and surrendered." But how can this doctrine of extinguishment be applied to a natural watercourse? It is important to notice the broad distinction there is, in the eye of the law, between the right to light and the right to the water of a natural watercourse. The owner and occupier of a house has *prima facie* no right to light which enters his windows sideways; it must be by grant, or by prescription, which supposes one. Both he and the adjoining land owner only own the light upwards. There was therefore no interest in land conveyed in *Winter v. Brockwell*, and the licensor's interest in his land remained as complete as it was originally, and the license was only something collateral to the land. In respect to a natural watercourse, it is directly otherwise; and the right which

a riparian proprietor upon it has, as to the use of the water, is, by force of the maxim above mentioned, a part of the freehold; and to deprive him of it by a diversion would be a deprivation of what is inseparably connected with and inherent in the land, of what in fact is parcel of the inheritance, and which passes with it. "Hence it is," he further remarks, "we find Lord Ellenborough ruling in 1807 the license in *Winter v. Brockwell* to be irrevocable, when in 1803, in *Fentiman v. Smith*, 4 East, 109, he held that the title to have the water flowing in the tunnel over the defendant's land could not pass without deed." The leading cases in the United States which favor the doctrine in *Wood v. Lake*, 1 Say. 3, are *Rerick v. Kern*, 14 Serg. & R. 272 [16 Am. Dec. 497]; *Ricker v. Kelly*, 1 Greenl. 117 [10 Am. Dec. 38]; *Clement v. Durgin*, 5 Id. 9, 13; *Ameriscoggin Bridge v. Bragg*, 11 N. H. 102; and *Wilson v. Chalfant*, 15 Ohio, 248 [45 Am. Dec. 574].

It is to be remarked, however, that some of these cases were decided in states where there are no courts of chancery, and where the common-law courts administer the principles of equity through the medium of legal forms. In *Clement v. Durgin*, the broad ground was taken, that whenever the acts done on the faith of a license have resulted in the creation of an interest, of whatever description, for the protection of which the continued existence of the license is necessary, the law will not permit it to be defeated by the party from whom it originally proceeded.

The courts of New Hampshire and of Ohio appear to have adopted this doctrine in its fullest extent: *Ameriscoggin Bridge v. Bragg*, 11 N. H. 102; *Wilson v. Chalfant*, 15 Ohio, 248 [45 Am. Dec. 574]. But this is much further than the courts of this country have generally gone: *Cook v. Stearns*, 11 Mass. 535; *Johnson v. Jordan*, 2 Met. 234 [37 Am. Dec. 85]; *Mumford v. Whitney*, 15 Wend. 380 [30 Am. Dec. 60]; *Miller v. Auburn etc. R. R. Co.*, 6 Hill, 61.

Most of the American courts have been satisfied with determining that "a party who has induced the incorporation of the property of another with his own, through the means of a promise not to interfere with its use or enjoyment by the latter, shall not be allowed to commit the fraud of appropriating it to his own purposes, although he may withdraw the right to use it in the manner originally contemplated, and compel the other party to resort for redress to an action:" 2 Am. Lead. Cas. 526, and notes; *Prince v. Case*, 10 Conn. 375 [27 Am. Dec. 675]; *Cook v. Stearns*, 11 Mass. 523. The courts of New York and Massachusetts are directly opposed to the doctrine that parol licenses are

revocable: *Id.* 583; *Whitmarsh v. Walker*, 1 Met. 313; *Dyer v. Sanford*, 9 Id. 395 [43 Am. Dec. 399]; *Mumford v. Whitney*, 15 Wend. 380 [30 Am. Dec. 60]; *Miller v. Auburn etc. R. R. Co.*, 6 Hill, 61.

It has been sometimes held that a license coupled with an interest is irrevocable; but this doctrine, although unquestionably correct in a qualified sense, can only be considered, according to the better authorities, as applicable to the temporary occupation of land, and confers no right nor interest in the land: *Mumford v. Whitney*, 15 Wend. 380 [30 Am. Dec. 60]; *Prince v. Case*, 10 Conn. 375 [27 Am. Dec. 675]; Angell on Watercourses, 319; *Wood v. Manley*, 11 Ad. & El. 34.

In illustration of this doctrine, Chief Justice Savage says in *Mumford v. Whitney*, 15 Wend. 380 [30 Am. Dec. 60]: "A. agrees with B. that B. may hunt or fish on his, A.'s, land; A. thereby gives B. a license for that purpose. This gives B. no interest in the land; he can not authorize any other person to go upon the land; it is a personal privilege granted to B. alone. If, after A. has given his consent and before B. has entered upon his land, A. changes his mind, he has a right to do so and forbid B. from entering upon his land for the specified purpose. The license is thus far executory, and may be revoked at pleasure; if B. afterwards enters, he is a trespasser. If, however, B. enters before any revocation of license, the license is then executed; and it is not competent for A. to revoke it and make B. a trespasser."

A similar illustration of a license coupled with an interest is furnished by the case of *Wood v. Manley*, 11 Ad. & El. 34, in which goods which were upon the plaintiff's land were sold to the defendant; and that by the conditions of the sale, to which the plaintiff was a party, the buyer was to be allowed to enter and take the goods.

"It was held that after the sale the plaintiff could not countermand the license; and the defendant having entered to take and the plaintiff having brought trespass, and the defendant having pleaded leave and license and a peaceable entry to take, to which the plaintiff replied *de injuria*, it was held that the defendant was entitled to the verdict, though it appeared that the plaintiff had, between the sale and the entry, locked the gates and forbidden the defendant to enter; and the defendant had broken down the gates and entered to take the goods." The plaintiff, as was said by Williams, J., having assented to the terms of the contract, put himself into a situation from which he could not withdraw.

The effect of such a license is in general merely to excuse and justify all acts done under and by virtue of it, while it continues unrevoked, which would otherwise be tortious: Angell on Watercourses, 139; 2 Am. Lead. Cas. 515; *Nettleton v. Sikes*, 8 Met. 34; *Heaney v. Heeney*, 2 Denio, 625; *Parsons v. Camp*, 11 Conn. 525; *Miller v. Auburn etc. R. R. Co.*, 6 Hill, 64; *Wood v. Leadbitter*, 13 Mee. & W. 838.

The cases of *Web v. Paternoster*, Palm. 71, of *Wood v. Lake*, 1 Say. 3, and *Taylor v. Waters*, 7 Taunt. 374, whose soundness had been repeatedly questioned in the English courts before the case of *Wood v. Leadbitter*, 13 Mee. & W. 838, were, in that case, finally and conclusively overruled. Whatever may have been some of the earlier decisions, therefore, there can be no question that at this day the weight of authority in the English common-law courts is decidedly against the position, that any indefeasible power or authority to exercise a continuing privilege on the land of another person can be given by a mere parol license, even when carried into execution and upheld by acts done in pais in accordance with its terms. Note to 2 Am. Lead. Cas. 522; *Fentiman v. Smith*, 4 East, 107; *The King v. Inhab. of Horndon-on-the-Hill*, 4 Mau. & S. 562; *Hewlins v. Shipman*, 5 Barn. & Cress. 221; *Wood v. Leadbitter*, 13 Mee. & W. 838.

In cases, however, where money has been expended, or improvements made and buildings erected on the faith of a parol license which has been thus executed, courts of equity have generally interposed, at all events, so far as to restrain the licenser from appropriating to his own use and benefit the labor expended and improvements made on the faith of such license, without placing the licensee in the same situation in which he stood before he entered upon its execution: 2 Story's Eq. Jur. 70, 75; Angell on Watercourses, 359.

We do not deem it material to determine whether the case at bar is to be regarded in the light of an agreement for an easement, or a parol license executed. An agreement for an easement is in equity taken out of the statute of frauds by a part performance, upon the same principle that a parol license executed is taken out of the statute: Angell on Watercourses, 359; *Le Fevre v. Le Fevre*, 4 Serg. & R. 241 [8 Am. Dec. 696]; 2 Eq. Cas. Abr. 525; *Wetmore v. White*, 2 Cai. Cas. 87 [2 Am. Dec. 323]; *Phillips v. Thompson*, 1 Johns. Ch. 131; 2 Story's Eq. Jur. 75.

The ground upon which the court interposes in such cases is.

“not simply that there is proof of the existence of a parol agreement, but that there is fraud in resisting the completion of an agreement partly performed.” *Phillips v. Thompson*, 1 Johns. Ch. 149.

But it is a well-established rule that equity will not enforce the specific performance of a parol agreement in a doubtful case; and where a party sets up part performance to take a parol agreement out of the statute of frauds, it is necessary, in the language of Mr. Justice Story, that “the contract should be established by competent proofs, to be clear, definite, and unequivocal in all its terms.” *Phillips v. Thompson*, 1 Johns. Ch. 149; *Frame v. Dawson*, 14 Ves. 386.

In applying this salutary and now well-recognized principle of equity jurisprudence to the case before us, we are of opinion that the evidence is too conflicting and inconclusive, and the agreement too indefinite and uncertain, to justify this court in granting to the complainants the relief prayed for in their bill. The decree of the circuit court must therefore be reversed without costs.

Decree reversed accordingly.

LICENSE DEFINED: *Mumford v. Whitney*, 30 Am. Dec. 60; note to *Ricker v. Kelly*, 10 Id. 40.

LICENSE, WHEN AND HOW REVOCABLE.—While a mere license is revocable, see note to *Ricker v. Kelly*, 10 Am. Dec. 40; *Woodward v. Seely*, 50 Id. 445; *Buel v. Irwin*, 24 Mich. 150, citing the principal case; yet if the license be executed, it has been held in some cases to be irrevocable: See *Putney v. Day*, 25 Am. Dec. 470; *Wilson v. Chalfant*, 45 Id. 574; note to *Ricker v. Kelly*, 10 Id. 42; note to *Rerick v. Kern*, 16 Id. 501; but in *Prince v. Case*, 27 Id. 675, it was held that a parol license to erect and maintain a building upon another's land was revocable, because if otherwise it would be in the face of the statute of frauds, which requires a conveyance of an interest in lands to be in writing; and see *Harris v. Gillingham*, 23 Id. 701; on the other hand, *Woodbury v. Parshley*, 26 Id. 739, holds that a parol license to erect a dam upon another's land, to be there maintained for a reasonable time, and to flow the land, was when executed irrevocable until the expiration of that time; and where abutments of a dam were constructed on the land of another by a parol license for a consideration, trespass against the licensee will lie for their destruction: *Wilson v. Chalfant*, 45 Id. 574; see also *Ricker v. Kelly*, 10 Id. 38, where the action was maintained against a licenser for removing a bridge erected upon his land by a parol license given for a consideration; and see further, in regard to licenses to erect dams and flow back water upon the licenser's land, *McKellip v. McIlhenny*, 28 Id. 711; *Woodward v. Seely*, 50 Id. 445; in the former of which an executed parol license was held irrevocable, while in the latter a similar license was held revocable; also in *Lockhart v. Gier*, 54 Wis. 135, the principal case was cited to the point that proof of permission to use another's land to flow water would not establish a permanent right or privilege to flow. In *Parkhurst v. Van Cortland*, 7 Am. Dec. 427, specific perform-

ance was granted in favor of parties who entered upon land under a parol license and made valuable and permanent improvements on the faith of a promise to sell or lease. A parol license to cut and carry away wood, if available at all, when no time is limited, must be acted upon within a reasonable time: *Gilmore v. Wilbur*, 22 Id. 410. A license to cultivate land can not be revoked after the licensees have entered thereon and raised crops in pursuance of the license: *Lowe v. Miller*, 46 Id. 188. A licensee is not entitled to notice to quit: *Doe v. Baker*, 25 Id. 706; but ejectment can be maintained against him only after demand made upon him for the possession, or after acts done by him of such character as to make him a wrong-doer: Id.

The erection of improvements upon the faith of parol licenses was an important element in determining their revocability in many of the preceding cases; thus in *Rerick v. Kern*, 16 Am. Dec. 497, a parol license to use the waters of a stream for a mill, afterwards erected, was held to be irrevocable; and see the notes to this case, and to that of *Ricker v. Kelly*, 10 Id. 42; and a parol license to divert a stream, executed by the erection of works, is not revocable: *Addison v. Hack*, 41 Id. 421; also an executed license to obstruct an easement is irrevocable: *Dyer v. Sanford*, 43 Id. 399. Whether a consideration is an element in determining a license to be revocable, see *Putney v. Day*, 25 Id. 470; *Reading v. Commonwealth*, 51 Id. 534. A license is revoked by the death of the licensor: *Putney v. Day*, 25 Id. 470; by the death of the licensee: *Prince v. Case*, 27 Id. 675; by the conveyance of the land to another: *Harris v. Gillingham*, 23 Id. 701; or by an action brought for the continuance of the license: *Joy v. Hull*, 24 Id. 625. A license given by statute to erect a dam in a river is revoked by a subsequent grant of authority to a corporation to construct a canal for the improvement of such river: *Susquehanna Canal Co. v. Wright*, 42 Id. 312; and see *Barbee v. Armstead*, 51 Id. 404, for a written contract to retain and support one's wife construed to be a mere parol license, and revoked by a demand for her restoration.

LICENSE, WHETHER MUST BE IN WRITING.—A license which in its nature amounts to an interest in land must be in writing: *Putney v. Day*, 25 Am. Dec. 470; *Mumford v. Whitney*, 30 Id. 71, and note; *Stevens v. Stevens*, 45 Id. 203; *Woodward v. Seely*, 50 Id. 445; but see *Le Fevre v. Le Fevre*, 8 Id. 696; *Woodbury v. Parshley*, 26 Id. 739; *McKellip v. McIlhenny*, 28 Id. 711.

EASEMENT CAN NOT BE CREATED BY PAROL, under the statute of frauds: *Pitkin v. Long Island R. R.*, 47 Id. 320, and prior cases in note; *Stevens v. Stevens*, 45 Id. 203; *Woodward v. Seely*, 50 Id. 445.

PART PERFORMANCE OR EXECUTION OF PAROL LICENSE, as taking the same out of the statute of frauds: *Parkhurst v. Van Cortland*, 7 Am. Dec. 427; *Ricker v. Kelly*, 10 Id. 38, and note 42.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

NICHOLSON v. STATE.

[18 ALABAMA, 529.]

TIME WHEN COIN COUNTERFEITED WAS CURRENT by law, usage, or custom is an ingredient of the offense; and an indictment for counterfeiting in which such time is not stated is defective.

IN INDIOTMENT, TIME AND PLACE MUST BE ADDED to every material fact.

MOTION to arrest a judgment on a conviction for uttering and publishing as true a counterfeit half-dollar. The grounds for the motion are stated in the opinion of the court. The motion being denied, the defendant brought error.

No counsel for the plaintiffs in error.

Baldwin, attorney general, for the state.

By Court, **PARSONS, J.** The motion to arrest the judgment was overruled, but the judge reserved several questions, as novel and difficult, relative to the sufficiency of the indictment, for the revision of this court according to the act: Clay's Dig. 469, sec. 1. There was a bill of exceptions in the case, but as there was no writ of error, we are confined to the questions reserved and referred to us as novel and difficult.

The plaintiff in error was indicted upon the fourth chapter of the penal code, sections 45-49, for having uttered and published as true a counterfeit half-dollar of the similitude of the current coin. It is enacted by section 45 that every person convicted of having counterfeited any of the gold or silver coin which shall be, at the time, current by law, usage, or custom, within this state. shall be deemed guilty of forgery in the second degree.

By section 49 it is enacted, among other things, that every person convicted of having uttered and published as true, and with intent to defraud, any counterfeit gold or silver coin, the counterfeiting of which is declared by the same chapter to be an offense, knowing such coin to be counterfeited, shall suffer, etc.

The time when the coin counterfeited was current by law, usage, or custom, within this state, is an ingredient in the offense. That being clear from the two sections taken together, it should have been distinctly stated in the indictment. The indictment states that the plaintiff in error, on the fifteenth day of June, 1848, in the county aforesaid, had in his custody and possession the piece of false coin, forged, etc., to the likeness, etc., of the good and legal coin, current within the limits of this state, by the laws and usages thereof, called a half-dollar. The time when the good and legal coin was current, etc., and which was counterfeited, is not stated, by adding the words "then and there," or otherwise. The settled doctrine is, that time and place must be added to every material fact in an indictment—thus if in an indictment for murder it be stated that J. S. at such a time and place, having a sword in his right hand, did strike J. N., etc., it is insufficient, for the time and place laid relate to the having the sword, and consequently it is not said when or where the stroke was given. This is the rule in cases of felony, but it has been relaxed in misdemeanors, for it is sufficient for them that time and place be added to the first act, and it will be construed equally to refer to all the ensuing acts: Archbold's Crim. Pl. 37, 38, and authorities there cited. In *Regina v. Richmond*, 1 Car. & K. 240, the indictment which, like the one before us, was on a statute, charged that the prisoner, on, etc., at, etc., feloniously had in his possession a mold "upon which said mold was made and impressed the figure and apparent resemblance" of the obverse side of a six-pence; the indictment was held bad on demurrer, as not sufficiently showing that the impression was on the mold at the time when the prisoner had it in his possession, but a fresh indictment with the words "then and there" before the words "made and impressed," was held good.

We are satisfied that the indictment is defective, and that the motion in arrest of judgment should have been sustained, and therefore the judgment is reversed and the cause remanded. The clerk will make the usual entry. It was necessary to consider but one point, as that was fatal to the indictment. But it is not alleged that the act was done feloniously, nor stated that

the coin counterfeited was gold or that it was silver. These omissions need not occur in the proceedings in the case hereafter.

INDICTMENT CHARGING DEFENDANT WITH COUNTERFEITING, uttering, and passing "Spanish dollars," currently passing in Ohio, is good; and the question whether or not such coins are current in that state is one of fact for the jury to determine: *Flight v. State*, 28 Am. Dec. 626.

TIME AND PLACE, NECESSITY OF ALLEGING, IN INDICTMENT: See *State v. Dayton*, 53 Am. Dec. 270.

WADDELL v. GLASSELL.

[18 ALABAMA, 561.]

PAROL EVIDENCE IS INADMISSIBLE TO ADD TO, VARY, OR EXPLAIN WRITTEN INSTRUMENT, as a general rule.

PAROL EVIDENCE IS ADMISSIBLE TO SHOW FRAUD IN MATERIAL PART OF WRITTEN CONTRACT; thus where the defendant agreed to deliver the plaintiff cotton of an average quality, and the plaintiff, in reducing the contract to writing, inserted "good fair cotton," as the quality the defendant agreed to deliver, knowing that by a local usage it was superior to the cotton agreed upon, and that the defendant was ignorant of this when he signed the written contract, parol evidence is admissible to show these facts as a defense to the contract.

ACTION on a bond, by which the defendant agreed to deliver to the plaintiff forty bales of "good fair cotton," as the rent to be paid by him for a lease of the plaintiff's plantation. The defense relied upon and the material facts appear from the opinion. The plaintiff's letter mentioned in the opinion was an offer of a lease of the premises, and the rent described in it was forty bales of "average cotton;" the letter further stated that if the defendant accepted the terms, he should show the letter to Brown, the overseer, and take charge of the plantation. The defendant proved by Brown that he showed the letter to him and took charge. Judgment for the defendant. The plaintiff brought error.

Hair, for the plaintiff.

R. H. Smith, contra.

By Court, PARSONS, J. The contract on which this suit was brought was between a lessor and his lessee. The premises leased were in Sumter county, and the contract was made and to be performed in the county, without reference to any mercantile or other usage or custom, except as stated hereafter. The only part of the contract which is material to be noticed

is the stipulation of the defendant, who was the lessee, to deliver to the plaintiff, who was the lessor, forty bales of cotton. The contract was made in March, 1841, and the defendant at that time took possession under it. By the contract that was actually made, the defendant was to deliver to the plaintiff forty bales of cotton of an average quality. The plaintiff's letter and the evidence of Brown prove that this was their contract. The contract was not attempted to be reduced to writing and signed by the parties until the thirtieth day of April, 1841. As written, it was for forty bales of good fair cotton. In the court below the defense was that the words "good fair cotton," instead of cotton of the average quality, were inserted in the contract as written, by fraud on the part of the plaintiff.

The general rule is, that parol evidence is not admissible to add to, vary, or explain a written instrument, but if a material part has been inserted by the fraud of one of the parties, this may be proved at law by parol evidence: *Paysant v. Ware & Barringer et al.*, 1 Ala. 160. It is also clear that written evidence, such as the plaintiff's letter, tending to prove the fraud, is admissible. As the letter showed what the contract was, and as the contract as written varied from it, the letter was evidence upon the question of fraud, though not conclusive, nor of itself sufficient. The plaintiff also objected to the evidence of Mr. Desha, but it was admitted. He proved that the plaintiff, after the contract was made, but before it was reduced to writing, learned from him, the witness, that good fair cotton, according to the Mobile classification, was superior to the average quality; and the plain inference from what the plaintiff said at that time is, that he then determined to prepare the written contract for the delivery of good fair cotton, and a part of what he said would authorize the inference that he did not intend to inform the defendant of the effect of the words "good fair," and that he supposed him to be ignorant of it. The contract, as written, was for the delivery of good fair cotton, but there was no other evidence that the defendant did not consent to modify his contract so as to agree with what was written and signed.

If it be conceded, therefore, that the contract as written could not be aided by parol evidence of the Mobile classification, so as to make it a contract having the effect which the plaintiff intended, still the evidence was admissible because it proved the plaintiff's motives and intention, and they were evidence tending to prove, what was material, that the defendant did not intend to change or modify his contract, but that, on the contrary,

he was led into the execution of the contract as written, by fraud on the part of the plaintiff. For I think the effect of the words "good fair" was materially different from the word "average" in this contract, whether the Mobile classification could be proved in aid of the contract as written, and for the purpose of giving it effect, or not. To my understanding, the words "good fair" and "average," in their primary signification, are not precisely the same, but that the quality indicated by the former is a shade above what the latter describes. The plaintiff, therefore, accomplished something that was material, with regard to the effect of the contract as written, and as the evidence tended to prove that this was done fraudulently, it was admissible.

Whether parol evidence of the Mobile classification is admissible in the case of a written contract for the payment or delivery of cotton, made and to be performed in the county, and having on its face no reference to that classification, or no other reference than the words "good fair," is a very important question, but it is not necessary now to decide it.

The judgment is affirmed.

PAROL EVIDENCE TO ALTER OR VARY WRITTEN CONTRACT, ADMISSIBILITY OF, GENERALLY: See *Inglebright v. Hammond*, 53 Am. Dec. 430, and note; *Rearich v. Swinehart*, 51 Id. 540; *West v. Kelly*, post; *Frederick v. Youngblood*, post.

PAROL EVIDENCE, ADMISSIBILITY OF, TO SHOW FRAUD IN WRITTEN INSTRUMENT or to prevent fraud: See *Rearich v. Swinehart*, 51 Am. Dec. 540; *Hammett v. Emerson*, 46 Id. 598; *Fisher v. Leland*, 50 Id. 805; *Schrader v. Decker*, 49 Id. 538; *Oliver v. Oliver*, 26 Id. 123.

EVANS v. THE GOVERNOR, USE OF, ETC.

[18 ALABAMA, 659.]

AMOUNT OF EXECUTION IS PRIMA FACIE MEASURE OF DAMAGES AGAINST SHERIFF, who, through mere neglect, fails to collect the money on it or to return it; and the damages can not be mitigated by merely showing that the original debtor was solvent and able to pay.

IF, AFTER NEGLECT OF SHERIFF TO COLLECT MONEY ON WRIT OR TO RETURN IT, the plaintiff should cause subsequent executions, upon which the succeeding sheriff could have made the money, to be returned to await his remedy against the prior sheriff for the default, this constitutes no bar to his action for such default, and does not reduce the damages.

SHERIFF MAY SELL AFTER RETURN DAY OF WRIT personalty levied on while the execution was in full force.

SURETIES OF SHERIFF ARE LIABLE FOR MONEY COLLECTED BY HIM AFTER RETURN DAY of the execution, but while he had property of the defendant in execution in possession by virtue of a levy made when the execution was in full force.

ERROR to the Perry circuit court. The opinion states the case.

Moore and Brooks, for the plaintiffs in error.

Garrott and Davis, contra.

By Court, CHILTON, J. This was an action upon a sheriff's bond. Three breaches are assigned in the declaration: 1. That the sheriff failed to return an execution, which was placed in his hands to be executed and returned by him as sheriff, in favor of the bank and against one Henry Y. Houze and Thomas Billingslea, as required by law, etc.; 2. That he failed to make the money upon the same, as required by the exigencies of the writ, when he could have done so by the use of due diligence; and, 3. That he collected the money upon said writ of execution, and failed to pay the same over to the plaintiff after demand duly made. Upon the trial a bill of exceptions was taken; upon which three questions arise for our consideration, namely: 1. Whether the amount of the execution is the measure of damages, as against a sheriff, who through mere neglect fails to collect the money on it, or to return it, the defendants in such execution remaining solvent; 2. Whether if, after such default, the plaintiff in such writ cause subsequent executions, upon which the succeeding sheriff could have made the money, to be returned to await his remedy against the prior sheriff for the default, this constitutes a bar to his action for such default, or should reduce the damages; and, 3. Whether the securities of a sheriff are liable for money collected by him, after the return day of the execution, but while he had property of the defendant in execution in his possession by virtue of a levy made when the execution was in full force.

We shall briefly consider these questions, in the order we have stated them; but before proceeding, it is proper to turn to the bill of exceptions, to ascertain whether it shows proof upon which the charge of the court, asserting the affirmative of the last proposition, could be predicated. That portion of it reads as follows: "It appeared in evidence that the bank recovered a judgment in the county court of Mobile, for the sum of sever hundred and sixty-one dollars and ninety-five cents damages, and twenty-two dollars and eighteen cents costs, against William

Huntington, Henry Y. Houze, and Thomas Billingslea; that on the eighteenth of October, 1842, an execution was duly issued on said judgment, and on the twenty-eighth day of the same month came to the hands of David Chandler, who was the sheriff of Perry county, to be executed, and was returnable at a term of the Mobile county court, to be holden on the second Monday in February, 1843; that on the sixth day of January, 1843, Chandler levied the execution upon four slaves and other goods and chattels of said Houze; that the following words appeared to be indorsed on said execution: 'Satisfied, February 13, 1843. David Chandler, Sheriff, by A. West, D. Sheriff.' It further appeared that Chandler neglected to return the said execution according to law, and kept the same to complete the sale of the property levied upon. The plaintiff introduced as a witness A. West, the deputy of Chandler, who deposed that he collected one hundred and thirty-five dollars on said execution, from the sale of Houze's property under the same; that the property was levied upon in January, and was sold to the amount of one hundred dollars, at Perryville, on the second Monday in February, 1843, and the balance on some day afterwards, not recollected by witness; and that the execution was satisfied the thirteenth of February, 1843."

This being the evidence, it follows, that, as the money was paid on the thirteenth day of February, which was the second Monday of that month, and the same day when a portion of the property levied on was sold and the balance was sold some day after that, the sheriff had property in his hands under the previous levy, undisposed of, when he received the money for which his securities are sought to be charged.

1. We come to consider the proposition, whether the amount of the execution is the true criterion of damages under the facts, as they are presented by the bill of exceptions in this case; and upon this point we find some contrariety of decision. In Kentucky it appears to be well settled by judicial decisions, that the amount of the execution is not the measure of damages, but the actual injury the party has sustained: *Taylor v. Commonwealth*, 3 Bibb, 356; *Fisher v. Davis*, Litt. Sel. Cas. 132; *Commonwealth v. Lightfoot*, 7 B. Mon. 298; *Arnold v. Commonwealth*, 8 Id. 111. In New York, the rule appears to be different; and it is there held, in actions against a sheriff for failing to return an execution, where the plaintiff proves the sheriff's negligence, and the ability of the party defendant in the writ, he is entitled to recover the full amount of his judgment: *Patterson v. Wester-*

veldt, 17 Wend. 543, and cases there cited: *Bank of Rome v. Curtiss*, 1 Hill (N. Y.), 275; *Pardee v. Robertson*, 6 Id. 550.

So also in Massachusetts, it is held, that where an officer neglects to do his duty, so that the effect of a judgment appears to be lost, the judgment in the suit so rendered ineffectual is *prima facie* evidence of the measure of damages which the plaintiff has sustained: *Weld v. Bartlett*, 10 Mass. 474, *per* Parker, J. The doctrine asserted by this case seems to have been adopted by this court in *Bagby, Use etc., v. Harris*, 9 Ala. 173, where the court say: "We are entirely satisfied that the damages can not be mitigated, by merely showing that the original debtor was solvent and able to pay, or that in the attempt to make him pay other defaults have taken place. If this was sufficient, it is evident, when the debtor is of sufficient ability, the excuse may be urged by each successive sheriff, and the plaintiff will only reach the fruits of his judgment when he finds one willing, as well as bound, to perform his duty." The reasoning in that case is opposite to the case at bar, and we deem it unanswerable. Were the rule otherwise, and could each sheriff, at the expense of nominal damages, answer the plaintiff's demand by saying, "True it is, I have failed negligently to collect the money due on the execution, but the defendant is good," the plaintiff could be postponed until the writ fell into the hands of some officer who could truly return it "no property found," and thus the plaintiff would lose his demand. The principle settled by the case of *Bagby, Use etc., v. Harris*, was reasserted in *Spence v. Tuggle*, 10 Id. 538. That was a suit against a sheriff for failing to execute a *ca. sa.*, and the court clearly intimate that, the default being shown, the *prima facie* damage is the amount of the plaintiff's demand, but which may be reduced by proof of the inability of the defendants in the *ca. sa.* to satisfy it, and which proof might in turn be rebutted by proof of their solvency. See also *Kirksey v. Prior*, 13 Id. 190 [48 Am. Dec. 47]. We are entirely satisfied with these decisions, and although the rule may appear somewhat stringent, it requires no more than a faithful discharge of official duty to avoid its operation.

2. As to the second question, there is not the least ground for saying that the plaintiff has forfeited or in any way discharged his right of action against Chandler and his securities. It is unnecessary for us to inquire what would have been his rights had he refused to permit Chandler or his securities to have enforced collection out of the defendants for their indemnity. None of them took any such step for their protection,

and the plaintiff was not under the slightest obligation, in the absence of their intervention, to avail himself of the technical ground that invalidates the entry of satisfaction indorsed on the execution, because the money was paid after the return day thereof, for the protection of the defendants in this action, whose principal improperly refused to pay over such money, and thereby to release them from liability. Much less do we regard the indisposition of the plaintiff to enforce the money again out of the defendants in the execution any evidence of fraud, either actual or constructive. That the plaintiff by his conduct in this case lost no right to proceed against the sheriff, is clearly deducible from *Garey v. The Bank*, 11 Ala. 771, and *Leavitt v. Smith*, 7 Id. 175.

3. As to the remaining proposition, we have as little difficulty. It is well settled, that if a sheriff levy on personal property, while the execution is in full force, he may proceed and sell it after the return day of said writ. He acquires by his levy a special property in it, of which he is authorized by law to divest himself by sale: *Bondurant v. Buford*, 1 Ala. 359; *Leavitt v. Smith*, 7 Id. 175. Having the right to sell the property, it would be absurd to say he had no right to receive the money, and having the right to raise the money by a sale of the property, the defendants had a corresponding right to pay the money and relieve the property. Nor can we see that it makes any difference whether Billingslea or Houze paid the money; nor was it important to inquire whether it was paid to prevent a sale of the property levied on. It is sufficient, we think, if, at the time the money was paid, the sheriff had property in his hands by virtue of the levy, which the law authorized him to sell in satisfaction of the execution. The defendants, or either of them, had the right, under such circumstances, to arrest the sale and prevent the sacrifice of the property by paying the money. But for the levy, it is very clear the plaintiff had no right to receive the money after the return day of the execution, and his securities in such case would be chargeable for it.

After a careful examination of the various points made in the argument of the counsel, we are unable to perceive any error in the record, and the judgment must consequently be affirmed.

LIABILITY OF SHERIFF FOR NEGLECT TO LEVY EXECUTION: See *Garrett v. Hamblin*, 49 Am. Dec. 53, and note.

SALE OF PROPERTY AFTER RETURN DAY OF EXECUTION, VALIDITY OF: See *Toomer v. Purkey*, 12 Am. Dec. 634; *Barden v. McKinnie*, 15 Id. 519; *Smith v. Mundy*, 52 Id. 221.

SURETIES OF CONSTABLE ARE LIABLE FOR MONEY FROM SALE AFTER RETURN DAY of execution, where the levy was made whilst the execution was in full force, and by virtue of which the constable had the property in possession: *Dennis v. Chapman, Governor, use of Oulbreath, post, 186*, citing and following the principal case.

PERMINTER v. KELLY.

[18 ALABAMA, 716.]

IF ONE JOINT OWNER OF CHATTEL SELLS ENTIRE CHATTEL, IT IS CONVERSION for which trover lies.

AGENT OF ONE JOINT OWNER SELLING ENTIRE CHATTEL IS GUILTY OF CONVERSION, whether he had notice of a co-tenant's rights or not, and is liable to an action of trover by a co-tenant, where neither negligence nor any fault whatever is imputable to the plaintiff.

BILLS OF EXCEPTION ARE CONSTRUED MOST STRONGLY AGAINST PARTY EXCEPTING.

TROVER for the conversion of certain slaves which belonged jointly to the plaintiff, John Kelly, and Alfred Kelly, and which the defendant obtained possession of and sold as the agent of Alfred Kelly. The court charged the jury that the plaintiff could maintain the action alone; the defendant prayed the court to instruct the jury that the action could not be maintained against the defendant, as he was the agent of one of the joint owners, but the court qualified the instruction, by charging that the plaintiff could maintain the action if the defendant sold the property for which the action was brought. The defendant excepted to these instructions. Verdict and judgment for the plaintiff; the defendant brought error.

Gayle, for the plaintiff in error.

Stone and Judge, contra.

By Court, PARSONS, J. It is clear that one joint tenant, tenant in common, or parcener, can not maintain trover against his companion for a thing still in possession; for the possession of one is the possession of both. It is, however, fully settled, that if one tenant in common destroy the thing in common, the other may bring trover: *Fennings v. Lord Grenville*, 1 Taunt. 241; *Heath v. Hubbard*, 4 East, 110. And a late English author observes, that "a sale of the whole of the property by one of them, adversely, and in exclusion of the other, would, it seems, be a conversion of the other's share, for which he might maintain trover:" 1 Arch. N. P. 454; *Barton v. Williams*, 5 Barn. & Ald. 395. This renders the law far more adapted to the rights

and the wrongs of the respective parties than it was in former times. He who sells his co-tenant's share of the property to a stranger who will hold against him has violated the relation he bore, and injured his companion as much, perhaps, as if he had destroyed the property. Why then should he not have a legal remedy against the wrong-doer instead of requiring him to look to the purchaser for his interest in the property, and he to the wrong-doer? To sustain the general proposition that when one joint owner of a chattel sells the entire chattel, it is a conversion for which trover lies, there are various American cases cited in the brief of the counsel for the defendant in error, and cited in those cases, and we entirely concur with them.

2. In this case the defendant below made the sale as the agent of one of the co-tenants, but the inference from the bill of exceptions is that he sold the entire property, and also delivered the possession, as the contrary is not stated. He must stand on the same ground with his principal. The sale was equally a wrong by both. In Tennessee it was held that one joint owner of property might recover against the sheriff, who sold the entire chattel under an execution against the other joint owner: *Rains v. McNairy*, 4 Humph. 356 [40 Am. Dec. 651]. The sheriff in that case had notice. That the sale by the defendant below was such an assumption of authority over another's property as to amount to a conversion, there can be no doubt. If a party claim the property in the chattels as his own, or even assert the right of another over them, it is evidence of a conversion—and where a person's property is sold by one, whether for his own use or the use of another, it is a conversion, for it is a tortious act, and the gist of the action: *Perkins v. Smith*, 1 Wils. 828; *Parker v. Goden*, 2 Stra. 813. A servant may be charged in trover, though the conversion be done by him for the benefit of his master: *Stephens v. Elwall*, 4 Mau. & Sel. 259. And where A. consigned the goods of B. to C., and C., without notice of the right of B., sold a part and kept the remainder in his possession, the sale was held to be a conversion: *Featherstonhaugh v. Johnstone*, 8 Taunt. 237; S. C., 2 Moore, 181; 2 Saunders on Pl. & Ev. 883. These authorities, and those on the brief of the counsel for the defendant in error, show conclusively that the defendant below was liable for selling the interest of the plaintiff in the slaves, whether he had or had not notice of the plaintiff's right. Neither negligence, nor any other fault whatever, was imputable to the plaintiff below. Consequently his right of property, or of action, is not to be taken away by the unauthorized act of another,

whether done innocently or otherwise. Even lunatics are liable for trespasses and other tortious acts by which another person is injured.

3. It is contended that the plaintiff below should not have recovered the entire value of the slaves, as he was only a part owner. The answer is, that we think he only recovered the value of his own interest; and, from the bill of exceptions, it is evident the court neither charged, nor was understood by the jury to charge, that he could recover for any share or interest but his own. The rule is to construe bills of exception most strongly against the party excepting. It does not appear by this bill of exceptions that the court charged that the plaintiff could recover for any share or interest in the slaves but his own.

The judgment is affirmed.

SALE OF COMMON PROPERTY BY ONE CO-TENANT IS CONVERSION for which trover will lie: See *Hall v. Page*, 48 Am. Dec. 235, note; *Lowe v. Miller*, 46 Id. 188, and note.

CONSTRUCTION OF BILLS OF EXCEPTIONS: See *Donnell v. Jones*, 52 Am. Dec. 194, and note.

DIAL v. HAIR.

[18 ALABAMA, 798.]

SPECIFIC PERFORMANCE OF CONTRACT CONTRAVENTING DESIGN AND POLICY OF LAW will not be decreed.

CONTRACT BY WHICH DEFENDANT WAS TO TAKE POSSESSION OF QUARTER-SECTION OF PUBLIC LAND, to occupy it until he became entitled to a pre-emption, and on obtaining a title from the government which was paid for by the plaintiff, to make a title of one half to the plaintiff, is illegal, and if, in pursuance of the agreement, the defendant enters into possession and obtains title, equity will not decree a specific performance in favor of the plaintiff.

ERROR to the Sumter chancery court. The opinion states the case.

R. H. Smith, for the plaintiffs in error.

Reavis, contra.

By Court, DARGAN, C. J. The material facts brought to our notice by the bill may be thus stated: In the year 1833 it was agreed between Jeremiah Dial and John Dial, his son, who was then a minor, that John should take possession of the north-west quarter of section eight, township nineteen, range two, west, being land lying in the Demopolis district, and occupy

the same until he should become entitled to a pre-emption thereto according to the laws of congress, and that the title should be procured in the name of the son; but the father was to pay the government for it, and when the son became of age he was to execute to his father a title to one half, retaining the other half himself as a compensation for his occupancy and cultivation of the land and procuring the title thereto. It is further shown that in pursuance of this agreement John took possession of the land, and occupied and cultivated it until some time in the year 1834, when he proved his pre-emption claim and procured a title, but the entire purchase money was paid by Jeremiah Dial, the father. After John became of age the land was divided between him and his father, John reserving the south half and giving his father the north half of said quarter-section, but neither the contract nor the division was evidenced by any instrument in writing. After this division the father entered into possession of his half, improved it, and retained the possession until his death in the year 1842. The bill further alleges that James Hair, one of the complainants, was appointed administrator *de bonis non* of Jeremiah Dial, deceased, and procured an order of sale from the orphans' court of Sumter, under which the north half of said quarter-section was sold as the property of Jeremiah, the intestate. This sale took place in February, 1846, and in August, 1846, the land was sold as the property of John Dial, under an execution against him issued on a judgment rendered at the fall term of the circuit court of Sumter, A. D. 1845. The bill prays a specific execution of the contract between Jeremiah, the father, and John, the son, in favor of the purchaser, who bought at the sale of the administrator of Jeremiah, and both John Dial and the purchaser who bought under execution against him are made defendants.

Two questions are raised upon the face of this bill: 1. It is insisted that the contract between the father and the son was illegal; 2. That the title of the father, being a mere equity and not evidenced by any instrument in writing, the orphans' court had no jurisdiction to decree a sale of it.

It may be admitted that at the time of entering into this agreement, there was no particular act upon the subject of pre-emptions that declared such a contract void in express words, but if, upon a review of all the legislation of congress upon the subject, such a contract would be considered as contravening the design and policy of the laws, a court of equity would not

enforce it. I will not quote the provisions of the various acts of congress upon the subject of pre-emption rights, but will only say that congress never designed to open a door to speculation, or to confer benefits on those who were not actual settlers on the public land. The whole object and design of the laws were intended to benefit the actual settler or occupant by enabling him to secure his home and thus place him above the power of the speculator; but when he had done this—when he had secured one quarter-section under any of the acts giving a right of pre-emption, he had then received the benefit designed for him, and he could not under the same act claim another pre-emption right. None of the several acts will warrant the construction that any one individual should become entitled under any one of them to more than one quarter-section of land, and if we sustain this contract, we should sanction a contrivance by which one not an actual settler or occupant could acquire many under the same act; for one not an actual settler may agree with or procure many to make settlements with the view to acquire the right of pre-emption, and by enforcing the contracts after the title has been obtained, perfect his right to the whole. This, in our judgment, would contravene the design and policy of the laws passed upon the subject, by enabling one not entitled to any right or benefit under the law to acquire more than one for whose benefit it was enacted. In the case of *Tenison v. Martin*, 13 Ala. 21, it is said that no case had been found where an assignment or a sale of a pre-emption right, before the entry had been made in the land office, had been upheld, and we are satisfied that we can not enforce such a contract without a total disregard of the policy of the law. The contract disclosed by the bill is illegal—it can not be enforced, and the chancellor erred in decreeing a specific performance. Having attained this conclusion, it is unnecessary to examine the other question. The decree must be reversed and the bill here dismissed.

PRINCIPAL CASE WAS QUOTED WITH APPROVAL in *Drexler v. Tyrrell*, 15 Nev. 133.

KNOX'S DISTRIBUTEES v. STEELE, ADM'R.

[18 ALABAMA, 815.]

PARTY COLLECTING MONEY ON JUDGMENT CAN NOT PROSECUTE WRIT OF ERROR to reverse it until he has refunded the money.

PLAINTIFF IN ERROR CAN NOT ASSIGN ERRORS AGAINST HIS CO-PLAINTIFFS, and thus reverse a judgment or decree rendered against the defendant in error; consequently a *scire facias* to his co-plaintiffs to hear errors can not be granted.

WRIT OF ERROR CAN NOT BE AMENDED BY STRIKING OUT NAME OF ONE AS PLAINTIFF and making him a defendant in error, where the record does not show that he should have been made a defendant and that he was improperly made a plaintiff.

ERROR to the Sumter orphans' court. The opinion states the case.

J. B. Clark, for the plaintiffs in error.

Reavis, contra.

By Court, DARGAN, C. J. Upon the death of John Knox, letters of administration were granted to Eleanor Knox, his widow, and to Hiram Steele, who gave a joint bond for the faithful performance of their duty as such. The widow afterwards intermarried with Joel Heard, who thereby became administrator in right of his wife. The administrators, being subsequently cited to make a final settlement of the estate, appeared in obedience to the citation, and filed an account current in the name of John Steele, Joel Heard, and Eleanor, his wife; but on the final settlement Joel Heard and wife disclaimed all participation in the administration of the estate, and it being admitted by Steele that he alone had acted in the administration, with his consent, the names of Joel Heard and wife were stricken from the account and the settlement proceeded against Steele alone. He was found indebted to the estate in a sum over nine thousand dollars, which was divided into three parts, there being three distributees at the death of the intestate, to wit, his widow and two infant children, and a decree for the separate portion of each was rendered against Steele—the decree for the separate portion of the widow being rendered in favor of herself and Joel Heard, her present husband.

From this decree a writ of error is prosecuted to this court, in the names of all the distributees, but Joel Heard and wife, being satisfied with the decree, refuse to assign errors. The other distributees now move the court that they be permitted to assign errors, not only against Hiram Steele, but also against Joel Heard and wife, their co-plaintiffs in error, and for this purpose ask that a *scire facias* to hear errors be issued to Heard and wife; and in the event this motion be not granted, they then ask to amend the writ of error so as to make Heard and wife defendants in error. The defendant has also moved that the

writ of error be dismissed, unless the plaintiffs will refund the portion of the decree that has been collected by execution since the rendition of the decree, and in support of this motion has submitted an affidavit showing that more than three thousand dollars has been collected by a sale of the defendant's property under the execution.

We will first advert to the motion of the defendant in error. In the case of *Hall v. Hrabowski*, 9 Ala. 278, the facts were that the plaintiff obtained judgment in the court below, which he brought to this court by writ of error, and whilst the writ was here pending, an execution was issued on the judgment, and the money collected. The court held that the proceedings must be stayed in this court, unless the plaintiff in error would refund the money collected to the defendant. So in the case of *Bradford v. Bush*, 10 Id. 274, it was said that a party who had collected the money on a judgment should not be permitted to prosecute a writ of error to reverse it until the money was refunded.

It is true that the exercise of this power is a matter of legal discretion, and will not be exercised by this court in every case where the money upon a judgment or decree has been paid; if the defendant has voluntarily paid the judgment or decree, without being coerced by execution, and we are satisfied that the plaintiff will be entitled to recover this amount upon another trial, we would not refuse to hear the errors because of this voluntary payment: *The Distributees of McCreeliss v. Hinkle, Adm'r*, 17 Ala. 459. But when the plaintiff sues out his execution, and collects the amount of the judgment or decree, or a part thereof, thus affirming the regularity of the judgment or decree by carrying it into execution, he ought not to be allowed to assign errors until the defendant is placed in *statu quo*.

A different practice from this might often lead to much litigation without producing any beneficial results. Thus, a trial of the right of property may be pending in the court below, or any other question growing out of the issuance of execution; these questions may have been decided by the court, and a writ of error brought on the judgment to this court, but the reversal of the original judgment would render them null and void. Other difficulties in permitting such a practice might be suggested, but we think it sufficient to say that we consider the rule settled by the cases referred to, of *Hall v. Hrabowski* and *Bush v. Bradford*, that where the plaintiff has sued out an execution and col-

lected all or a portion of the judgment or decree, we will not hear the errors assigned by him on the judgment until the money collected by execution is refunded.

The facts set forth in the affidavit are not controverted. They are therefore admitted to be true, and we must require the plaintiffs in error, who wish to assign error, to refund the amount they have received on their respective decrees, before they can be allowed to proceed. But we will not dismiss the writ of error at this term. If they shall refund to Steele the amount they have received on their respective decrees by the next term of this court, the errors assigned, or which may be assigned, will then be heard, but if they fail to refund the money, the writ of error will be dismissed.

In reference to the motion of some of the plaintiffs in error, we think it sufficient to say, that there is no rule of practice that will permit one plaintiff in error to assign errors against his co-plaintiff, and thus to reverse the judgment or decree rendered against the defendant in error. It can not be done; consequently a *scire facias* to Heard and wife to hear errors would be unavailing and can not be granted.

Nor can we allow an amendment, or rather an alteration of the writ of error, so as to strike the names of Heard and wife out of the writ as plaintiffs and make them defendants in error. The statute does not go so far. Writs of error may be amended by the record if the writ be defective, but in the case before us, the writ of error is not defective, and we can not strike the name of one out of the writ as plaintiff and make him defendant in error, unless it appeared that he was improperly made a plaintiff in error, when the record showed that he should have been a defendant. This record does not show this to be the case. A decree was rendered in favor of all the plaintiffs in error, and they all joined in the writ of error. All that the plaintiffs who desire to assign errors can do is to summon and sever from Heard and wife, and to assign errors alone; but we apprehend that the errors assigned would necessarily produce the same result as if Heard and wife were defendants in error, and the errors were assigned against them as well as against Steele.

STATE v. WILLIAMS.

[19 ALABAMA, 15.]

INDICTMENT CHARGING STEALING OF BANK NOTES *EO NOMINE* IS SUFFICIENT, the number, denomination, and value of the notes being stated.

INDICTMENT for grand larceny for stealing a purse of certain value, and also certain "bank notes" *eo nomine*; the indictment stated number, denomination, and value of the notes. A motion to quash the indictment was overruled, and the defendant, having been found guilty, moved to have the judgment arrested, because the indictment did not sufficiently describe the notes, nor aver that they were notes of an incorporated bank, or were a valuable existing contract when the larceny was committed, or were of value due and unpaid at that time. The court overruled the motion, but the questions were reserved and certified to the supreme court as novel and difficult.

Baldwin, attorney general, for the state.

Blocker, contra.

By Court, CHURTON, J. The motion to quash this indictment, as also to arrest the judgment, was properly overruled. Waiving the consideration of the question, whether, inasmuch as the indictment charges a larceny from the person of a certain purse of the value of one dollar, this would not, under the general finding of the jury, support the judgment of the court, we are quite sure that the indictment sufficiently avers the larceny of the bank notes. The number, denomination, and value of the notes are stated, and the indictment describes them as "bank notes." In this it conforms to the statute, which enacts that "every person who shall commit the offense of larceny, by stealing any goods or chattels, or any bank note, bond," etc. It seems to be well settled by cases arising under similar statutes, that it is sufficient to charge the stealing of bank notes *eo nomine*. See the cases cited on the brief of the attorney general. It was formerly the practice in indictments for stealing notes, etc., to set them out at full length: *Rex v. Johnson*, 3 Mau. & Sel. 541; 2 Russ. on Crimes, 170; but it has long been settled that this particularity is unnecessary, and that it is sufficient if the indictment follow the descriptions of the property stolen, as given in the statute: *Id.* 186, and cases cited.

In *Rex v. Johnson*, 3 Mau. & Sel. 539, Lord Ellenborough, C. J., said he considered that after the statute had made bank notes the subject of larceny, they might be described in the same manner as other things that have an intrinsic value; that is, by any description applicable to them as a chattel.

Le Blanc, J., in the same case, replying to an objection similar to that urged by the counsel for the prisoner in the case before us, said: "The argument upon this part of the case has

arisen upon the practice that has prevailed, of describing the particular sum for which the note is payable, and that the money secured thereby is unsatisfied. But the answer to such an argument is this, that whether it be payable for one sum or for another, it is equally a bank note, and a bank note is the subject of larceny. Therefore, it is not a good objection that the bank note is not sufficiently set out." These remarks are cited with approval by Mr. Russell: 2 Russ. on Crimes, 187; and are so opposite to the case before us, that we deem any further comment unnecessary: See the cases cited in *The United States v. Moulton*, 5 Mason, 537; *Greeson v. The State*, 5 How. (Miss.) 30-38. These authorities conclusively show that the court below did not mistake the law in the points referred to this court as novel and difficult, and as there is no writ of error in the case, we can not look into the bill of exceptions.

Let the judgment be affirmed.

DESCRIPTION OF MONEY AND BILLS IN INDICTMENT FOR LARCENY: See *Lord v. State*, 51 Am. Dec. 231, and note discussing this subject. In *Arnold v. State*, 52 Ind. 281, it was held that an indictment for robbery, the property alleged to have been taken being bank notes or bills, or United States treasury notes or bills, which, in describing such notes or bills, did not state their denominations by the use of the word "denomination," or equivalent words, was bad on a motion to quash; the court referred to the principal case.

DENNIS ET AL. v. CHAPMAN, GOVERNOR, USE OF CULBREATH.

[19 ALABAMA, 29.]

DECLARATIONS AND ADMISSIONS OF PARTY AGAINST HIS INTEREST ARE ADMISSIBLE as evidence against him; but the witness who deposes to such declarations or admissions should give the precise language of the party if he can; if he can not, he should be able to state the substance of them; if he can not undertake to testify to the language, nor to the substance of the admissions, he ought not to be allowed to depose; consequently a witness can not testify who does not propose to state the language nor the substance of the admissions, but merely his understanding of them.

ADMISSIONS OF CONSTABLE MADE AFTER HE WENT OUT OF OFFICE, and when he was not in the performance of any duty growing out of his office and connected with this transaction, are not evidence to charge his sureties.

SURETIES OF CONSTABLE ARE LIABLE FOR MONEY FROM SALE AFTER RETURN DAY of execution, where the levy was made whilst the execution was in full force, and by virtue of which the constable had the property in possession.

COVENANT against the sureties on an official bond. The material facts are stated in the opinion. The defendants offered to prove by one Hunter that he had a conversation with the plaintiff about the time he served the notices on the present defendants, and his understanding from the conversation was that the matter was pretty well arranged. This evidence, on the plaintiff's objection, was excluded. The plaintiff, against the defendants' objection, introduced one Cunningham, who testified that he had held a conversation with the constable after his removal from office, and while on his way to California, and the constable said that the defendants had been writing to him concerning the matter; that they could not be injured by it, as no money could be made out of them by legal process, and that he would pay the debt and relieve them from liability on returning from California. Verdict and judgment for the plaintiff; the defendants brought error.

Hudson, for the plaintiff in error.

Heflin, contra.

By Court, **DARGAN**, C. J. This was an action of covenant brought against the securities of a constable under the following circumstances. The constable sold a slave belonging to the plaintiff, to satisfy executions he had against him; the slave brought more than enough to satisfy the debts, and the plaintiff demanded the surplus remaining in his hands, but the constable failed to pay it over. Several objections were taken to the ruling of the court, which we will notice in the order they are presented by the assignment of errors.

1. The demurrer to the declaration was correctly overruled; the declaration is framed with care and is entirely good.

2. The declarations and admissions of a party against his interest are admissible as evidence against him; but the witness who deposes to such declarations or admissions should give the precise language of the party if he can; if he can not, he should be able to state the substance of them. If he can not undertake to testify to the language nor to the substance of the admissions, he ought not to be allowed to depose. Tested by this rule, we do not think the court erred in rejecting the evidence of Hunter. He did not propose to state the language nor the substance of the admission, but merely his understanding of the admissions. If he had stated the admissions made, either in the language of the plaintiff or the substance of them, the jury might have understood them differently from the witness.

3. But it is very clear that the court erred in permitting the admissions of the constable, made after he went out of office, and when he was not in the performance of any duty growing out of his office and connected with this transaction, to go to the jury as evidence to charge his securities. To make the admissions of an officer evidence against his securities, they must be made in the performance of some official act or duty connected with the transaction out of which the breach of the condition of the bond is alleged to have arisen, and if they are made at a time when he is performing no official act or duty required of him, they are inadmissible to charge his securities: *Evans v. State Bank*, 13 Ala. 787, and cases there cited.

Another question has been raised on the brief of the counsel for the plaintiff in error, which is, that the constable having sold the slave after the return day of the execution, his securities are not liable for the money, notwithstanding the levy was made whilst the execution was in full force, and by virtue of which he had the slave in possession. Although this question is not raised by the assignment of errors, we deem it proper in this case to say, that the case of *Evans v. Governor*, 18 Ala. 659 [*ante*, 172], decided at the present term, shows that the defendants, under these circumstances, would be liable for the money received by the constable upon the sale of the slave, and that the receipt of the money was within the official duties of the constable, and therefore covered by his bond.

For the error we have pointed out, the judgment must be reversed, and the cause remanded.

ADMISSIONS OF PARTY AGAINST INTEREST, ADMISSIBILITY OF, AS EVIDENCE: See *Bivins v. McElroy*, 52 Am. Dec. 258, and note.

DECLARATIONS AGAINST INTEREST, ADMISSIBILITY OF, AS EVIDENCE: See *Maxwell v. Harrison*, 52 Am. Dec. 385, and note; *Settle v. Alison*, Id. 393.

SURETIES OF CONSTABLE ARE LIABLE FOR MONEY FROM SALE AFTER RETURN DAY of execution, when: See *Evans v. Governor*, *ante*, 172.

SURETY IS ONLY BOUND BY DECLARATIONS OF PRINCIPAL, when made in the course of the business for which the surety obligates himself, so as to become a part of the *res gestæ*: *Blair v. Perpetual Ins. Co.*, 47 Am. Dec. 129.

LOWREMORE v. BERRY.

[19 ALABAMA, 130.]

PROMISSORY NOTE IS NOT SUBJECT TO LEVY AND SALE under execution. POSSESSION IS SUFFICIENT EVIDENCE OF TITLE TO ENABLE PLAINTIFF TO MAINTAIN TROVER against a wrong-doer, although the title to the chat-

tel may not be in the plaintiff but in another; and if the defendant would protect himself by showing an outstanding title in another, he must connect himself with it by showing that he acted under the authority of him who was in fact the owner.

POSSESSOR OF PROMISSORY NOTE MAY MAINTAIN TROVER for its conversion, although the legal title to the note and the right to sue for the money due thereby is in the payee.

TROVER WILL NOT LIE FOR VALUE OF NOTE PAID BEFORE CONVERSION, or in any manner legally discharged, for in fact it would have no value; but if the word "paid" was written across the face of the note by mistake, or by one without authority, this would not discharge the maker from his obligation to pay, and consequently trover would lie for its conversion.

TROVER to recover the value of a promissory note drawn by one Montgomery, and payable to one Newton. The plaintiff gave the note to a third person to collect, with instructions to apply the money he should make on it on a judgment he held against the plaintiff. The third person being unable to collect the money due on it, and having an execution against the plaintiff, gave the note to the sheriff, who levied the execution upon it and sold it; the defendant purchased the note at the execution sale, and offered to surrender it to the plaintiff if he would refund to him what he had paid on it. The court charged the jury that the plaintiff could not recover on this evidence. Verdict and judgment for the defendant; the plaintiff appealed.

Coggin, for the plaintiff.

Peck, *contra*.

By Court, **DARGAN, C. J.** It is admitted by the counsel for the defendant, that the note was not subject to levy and sale, and that the defendant obtained no title to it by his purchase. But it is contended, that as the note was not indorsed by the payee, the legal title is still in him; consequently that the plaintiff can not recover, because he failed to show any legal title to the note. If the action had been founded on the note, this objection would have been fatal to the plaintiff's right to recover. But it is not. The gist of the action is the wrongful conversion, and we think the principle is well settled, that possession alone is sufficient evidence of title to enable the plaintiff to recover in an action of trover against a wrong-doer, although the title to the chattel may not be in the plaintiff, but in another; and if the defendant would protect himself by showing an outstanding title in another, he must connect himself with it, by showing that he acted under the authority of him who was in fact the owner. In the case of *Dozier v Joyce*, 8 Port. 303, it was held

that the mere prior possession was sufficient to sustain the action of detinue against a trespasser, and that he could not defend himself by showing an outstanding title in another, without in some manner connecting himself with such title. To the same effect is the case of *Duncan v. Spear*, 11 Wend. 54. We think the principle recognized by these cases is decisive to show that the plaintiff might have recovered, if he had satisfied the jury of his previous possession of the note, notwithstanding the legal title to the note, and the right to sue for the money due thereby, were shown to be in the payee.

It may however be contended that the note was paid, as the word "paid" was written across the face of it, and that therefore the action can not be maintained. If the note in truth was paid before the conversion, or in any manner legally discharged, then we admit that trover will not lie to recover the value of it, for in fact it would have no value; but if the word "paid" was written across the face of the note by mistake, or by one without authority, this would not discharge the maker from his obligation to pay, and consequently, trover would lie for its conversion; and we think the circumstances of this case were such as required the question of payment to have been left to the jury to determine.

The court erred in the instructions given to the jury, and the judgment must be reversed, and the cause remanded.

TROVER, WHAT TITLE MUST BE SHOWN TO SUSTAIN: See *Danley v. Rector*, 50 Am. Dec. 242; *Brazier v. Ansley*, 51 Id. 408.

METCALF v. METCALF.

[19 ALABAMA, 319.]

RECORD CAN ONLY BE AMENDED BY SOME MATTER OF RECORD; parol evidence is not admissible for this purpose.

DECREE NUNC PRO TUNC AGAINST ADMINISTRATORS IS NOT AUTHORIZED where the memoranda upon which the decree was rendered show but few of the facts upon which a regular decree of the orphans' court could be based.

ERROR from a decree *nunc pro tunc* rendered by the Dale county probate court in favor of Isaac Metcalf against John and Mary Metcalf, the administrators of one Anthony Metcalf, for his share of the estate. The clerk certified that the following memoranda from the trial docket of orphans' court are the only evidence upon which the decree was rendered: "Joshua Mor-

ris, heir of A. Metcalf, use of J. W. Williamson, v. Adm'rs. Judgment on demurrer. Leave to amend granted on payment of costs of the term. Costs paid by S. T. Roach, attorney. Ordered to appoint auditors, Benjamin Walding, Mathew Johnson, and Daniel Johnson. Ordered that they report *instantly*. Auditors' report in administrator's hands, \$469.82. Isaac Metcalf, heir of A. Metcalf, v. Administrators. Same as above as to auditors, etc. Auditors' report in hands of administrator, \$469.82."

Buford, for the plaintiff in error.

F. S. Jackson, contra.

By Court, PARSONS, J. There are numerous decisions of this court covering the points presented by the assignment of errors in this case: *Thompson v. Miller*, 2 Stew. 470; *Wilkerson v. Goldthwaite*, 1 Stew. & P. 159; *Moody v. Keener*, 9 Port. 252; *Brown v. Bartlett*, 2 Ala. 30; *Armstrong v. Robertson*, Id. 164; *Benford v. Daniels*, 13 Id. 667; *Bondurant v. Thompson*, 15 Id. 202. It is well settled by these decisions, that a record can only be amended by some matter of record; and that parol evidence is not admissible for this purpose. In *Brown v. Bartlett*, *supra*, it is held that if no warrant for the amendment appears in the record, none can be presumed to exist; and to the same effect is the case of *Rains v. Ware*, 10 Ala. 625. Upon what evidence, except the memoranda on the trial docket set out in the record, the judgment *nunc pro tunc*, entered on the fourteenth of August, 1849, was predicated, is not shown, and we have seen that we can not presume that any other evidence exists, or was before the court; the memoranda are wholly insufficient.

In *Moody v. Keener*, 9 Port. 252, issue had been joined on the plea of "not guilty," in an action on the case. The jury returned a verdict in favor of the plaintiff, which the judgment entry recited as a verdict in an action of *assumpsit*. The judgment was reversed by this court, because the verdict was not responsive to the issue. Upon the cause being remanded to the circuit court, a motion was submitted to amend the judgment entry *nunc pro tunc*, which was sustained. The evidence introduced to sustain the motion was the docket of the judge presiding on the trial of the cause, which contained the following memoranda opposite the statement of the case, viz.: "Dem. overruled. Jury, 1, verdict for plaintiff," and the file of papers in the cause; and upon the writ was an indorsement in these words, viz.: "We, the jury, find for the plaintiff one thousand

dollars and twenty-five cents, with interest and costs of suit." This proof was held to be insufficient to authorize the judgment *nunc pro tunc*.

In this case, the memoranda show but few of the facts upon which a regular decree of the orphans' court could be based. They do not show a presentation of his accounts and vouchers by the administrator for settlement, publication as required by law, an allowance of the accounts and vouchers by the court, the amount received by the administrator, or the amount paid out by him; nor do they show who is the administrator, nor whether the settlement was partial or final. If it be legitimate to look to these memoranda, they are wholly insufficient.

The judgment must be reversed, and the cause remanded.

ENTRY OF JUDGMENT NUNC PRO TUNC: See *Graham v. Lynn*, 39 Am. Dec. 493, and note; *Ward v. Ringo*, 47 Id. 654.

WEST v. KELLY.

[19 ALABAMA, 353.]

PAROL EVIDENCE IS NOT ADMISSIBLE TO ADD TO OR VARY WRITTEN INSTRUMENT; but if it be apparent that the instrument in writing contains but a part of the agreement entered into by the parties, parol proof may be received to prove the entire contract, otherwise the contract could not be brought before the court; but the parts of the agreement proposed to be proved by parol must not be inconsistent with or repugnant to the intention of the parties, as shown by the written instrument.

PAROL EVIDENCE IS NOT ADMISSIBLE TO ALTER PROMISSORY NOTE given to attorneys for professional services to be afterwards rendered in a suit to be instituted, and to show that it was the agreement of the parties that the note was not to be paid unless the attorneys should be successful in the suit they were to bring.

PAROL EVIDENCE IS ADMISSIBLE TO PROVE FAILURE OF CONSIDERATION, either in whole or in part of a written instrument.

COURT IS NOT BOUND TO SEPARATE LEGAL FROM ILLEGAL EVIDENCE when both are offered together and as a whole; and if the party offering it does not separate the legal from the illegal testimony, the whole may be rejected.

ASSUMPSIT on a promissory note reciting that on a certain date the defendants would pay to the plaintiffs, attorneys at law, a certain sum in consideration of certain services to be performed by them in a suit in chancery thereafter to be instituted. The defendants offered parol evidence to show that the note was not to be paid unless the suit in chancery was successful. The plaintiffs objecting, the evidence was excluded, and the defendants excepted.

Huntington, for the plaintiffs in error.

E. W. Peck, contra.

By Court, DARGAN, C. J. The general rule is admitted by all, that parol proof can not be received to add to, detract from, vary, or contradict a written contract. But the application of this general rule to each particular case is frequently a task of difficulty, and has given rise to as many contradictory decisions as any question with which courts have had to deal. If the instrument is perfect and complete, that is, if it contains the entire contract, then the rule is inflexible that parol evidence can not be received to add another term to the written instrument, or to change its legal effect: 3 Stark. Ev. 1006; Cowen & Hill's Notes to Phill. Ev. 1471; *Litchfield v. Falconer*, 2 Ala. 280; *Paysant v. Ware & Barringer*, 1 Id. 161; *Beard v. White*, Id. 436; *McCoy v. Moss & Newberry*, 5 Port. 88. But if it be apparent that the instrument in writing contains but a part of the agreement entered into by the parties, then parol proof may be received to prove the entire contract, otherwise the contract could not be brought before the court: Cowen & Hill's Notes to Phill. Ev. 1471-1473. But the parts of the agreement proposed to be proved by parol must not be inconsistent with or repugnant to the intention of the parties, as shown by the written instrument; for to receive parol proof of a part not reduced to writing, which is directly repugnant to the intention of the parties, as expressed in the written instrument, would at once annul the rule that parol evidence can not be received to contradict or vary the terms of a written agreement: *Jeffery v. Walton*, 1 Stark. 267; Cowen & Hill's Notes to Phill. Ev. 1472.

Applying these general rules to the instrument sued on, and to the parol proof offered by the defendants, which was rejected by the court, I can perceive no error. The note shows upon its face that it was given for professional services, to be afterwards rendered, but it is payable at a time certain, and is, in legal effect, a promissory note. The parol proof, however, tended to show that it was the agreement of the parties that the note should not be paid unless the payees, who were attorneys at law, should be successful in the suit they were to bring, and for the bringing of which the note was given. To allow this proof would be to allow parol evidence to change the intention of the parties as expressed in the note. It would not only alter the time of its payment, but would show that the payment of the money, according to the contract, was dependent on a

condition or a contingency, and thus the legal effect of the instrument as a promissory note would be destroyed.

But it is argued that the proof offered by the defendants was admissible, because it tended to prove a failure of consideration. Now I admit that if the proof had tended to prove nothing else, then its rejection would have been erroneous; for there can be no doubt that parol evidence may be received to prove a failure of consideration, either in whole or in part. But the proof offered by the defendant went further than this. It tended to prove that the payment of the note was dependent on the condition that the payees were successful in the suit they were to bring, and that this was a term of the contract. It was offered, too, as a whole. It might therefore properly be rejected; for the court is not bound to separate legal from illegal evidence, when both are offered together. It is for the party himself to separate the legal from the illegal proof, and offer such only as is legal. If he does not do this, but offers both legal and illegal evidence, as a connected whole, it is not error to reject it.

Let the judgment be affirmed.

PAROL EVIDENCE TO ALTER OR VARY WRITTEN CONTRACT, ADMISSIBILITY OF, generally: See *Waldell v. Glassell*, ante, and note; *Frederick v. Youngblood*, post, 209.

PAROL EVIDENCE, WHEN ADMISSIBLE TO SUPPLY OMISSION IN CONTRACT: See *Union Bank v. Meeker*, 50 Am. Dec. 559.

PAROL EVIDENCE, ADMISSIBILITY OF, TO SHOW WANT OF CONSIDERATION: See *Erwin v. Saunders*, 13 Am. Dec. 520; *Stackpole v. Arnold*, 6 Id. 150.

MCCRABEY v. REMSON.

[19 ALABAMA, 430.]

TRANSCRIPT OF SUIT OF SISTER STATE IS NOT EVIDENCE of any fact that can only be collected from it by inference.

ADMISSIONS ACTED ON BY OTHERS ARE CONCLUSIVE against the party making them, in all cases between him and the person whose conduct he has influenced; nor is it material whether the admission is expressly made or is to be inferred from the conduct of a party; and in the operation of this rule, it is unimportant whether the admission is true or false, made fraudulently or innocently, it being the fact of another's having acted on it that renders it conclusive.

ONE IS ESTOPPED TO CLAIM TITLE UNDER PAROL GIFT FROM TESTATOR to a slave which he surrendered on demand to an executor and admitted to be a part of the estate, and which he subsequently hired from the executor who had inventoried him as part of the estate, although he acted under a mistake as to his legal rights.

PERSON CLAIMING TITLE UNDER ONE ESTOPPED IS BOUND by the estoppel, though he claims *bona fide*, unless the estoppel is fraudulent.

DETINUE to recover a slave, brought by the executor of one Carr. The testator had died in Georgia, and by his will, duly probated in Habersham county, in that state, had left the slave in question to Joel Hunt, in trust for his wife. For several years previous to the death of Carr, and at the time of his death, Hunt had possession of the slave under a parol gift of her from Carr to his wife; but on demand of the executor, he surrendered up the slave to be appraised, and admitted her to be a part of the estate; she was appraised and inventoried as part of the estate and was in the possession of the executor for about a year, when he then hired her out to Hunt, who gave his note for the hire; Hunt sold her to one Finley, who brought her to this state and sold her to the defendant. The plaintiff, for the purpose of showing that the estate had been declared insolvent, and to show the amount of negroes charged against him as executor, offered in evidence the transcript of a suit instituted by him in Georgia, as executor, for a final settlement of the estate; but the evidence was excluded. The court charged, that notwithstanding the delivery up by Hunt of the slave to be appraised, on the executor's demand, and her subsequent appraisal with his knowledge and consent, and his subsequent hiring of her, still if he had a complete title under the parol gift to his wife, and acted under a mistake as to his rights to the property, the plaintiff could not recover; that if Hunt had a complete title by parol gift he might waive it and hold under the will, but that such a waiver would not affect the rights of a *bona fide* purchaser who had no notice of the waiver. Verdict and judgment for the defendant. The plaintiff assigns the exclusion of the transcript and the instructions of the court as error.

White and Parsons, for the plaintiff in error.

Rice and Morgan, contra.

By Court, PARSONS, J. The record of the suit in chancery, in Georgia, was offered as evidence of the insolvency of the estate of plaintiff's testator, and to show the number, value, etc., of the slaves charged to the plaintiff as executor. The insolvency of the estate is clearly shown by the transcript, and it is competent evidence of this fact; but we can not see the relevancy or materiality of this fact in this suit, for the plaintiff's rights are the same, whether the estate is solvent or insolvent. Hence

the plaintiff was not injured by the exclusion of the transcript when offered for this purpose.

If the transcript had been offered in connection with other evidence, it would probably be admissible, as showing that the slave sued for had been charged to the plaintiff, as the property of the testator. But if this fact can be collected from the transcript alone, it is only by inference from the character and objects of the suit. Lord Chief Justice De Grey, in his celebrated opinion of the *Duchess of Kingston's Case*, which has since been followed as a just exposition of the law upon this subject, holds, "that neither the judgment of a concurrent nor exclusive jurisdiction is evidence of any matter to be inferred by argument from the judgment:" 2 Phill. Ev. 4. Taking this to be the law, the transcript was properly excluded by the court below.

But in the charge first given, we think the circuit court mistook the law. It is well settled that admissions which have been acted on by others are conclusive against the party making them, in all cases between him and the person whose conduct he has influenced. Nor is it material whether the admission is expressly made or is to be inferred from the conduct of a party. And in the operation of this rule, it is unimportant whether the admission is true or false, made fraudulently or innocently, it being the fact of another's having acted on it that renders it conclusive. In *Dezell v. Odell*, 3 Hill (N. Y.), 215 [38 Am. Dec. 628], a constable had seized goods by virtue of execution, which were delivered to a third person, on his giving a receipt to redeliver them on a certain day; when the day arrived, the receiptor refused to redeliver them, claiming that the goods at the time of the levy and receipt were his own, and the court held, that in an action brought by the constable to recover the goods, the receiptor was estopped from setting up title in himself; Cowen, J., in delivering the opinion of the court, saying: "Had the defendant's claim been interposed at the time of the levy, and he had signed the receipt in terms without prejudice to his right, the question would have been open. The creditor would thus have been put upon his guard, and enabled to seek for other property on finding that his debtor had no title to that in question. Indeed, here was a cause of action on the part of the receiptor, directly calculated to influence the conduct of the creditor in a way prejudicial to his interests, unless we hold the receiptor. The officer being induced to part with the possession, or to forbear taking actual possession, by the receiptor recognizing his right, and agreeing

to take or hold for him, was itself an injury, if we now let the defendant go free. We then have a clear case of an admission by the defendant, intended to influence the conduct of the man with whom he was dealing, and actually leading him into a line of conduct which must be prejudicial to his interests, unless the defendant be cut off from the power of retraction. This is the very definition of an estoppel *in pais*. For the prevention of fraud, the law holds the admission to be conclusive."

In *Gosling v. Birnie*, 20 Eng. Com. L. 155, a defendant, who was a wharfinger, agreed to hold certain timber for the plaintiff, who purchased of one Ross. There was evidence showing that Ross had previously sold the timber to one Allum, of which the defendant had notice. Some time after the defendant agreed to hold the timber for the plaintiff, he presented a bill for wharfage due upon it, saying to the plaintiff: "These are the only charges on your timber." Afterwards, refusing on demand to deliver the timber to the plaintiff, an action of trover was instituted to recover damages for its conversion. The defendant rested his defense upon the ground that the timber was not the plaintiff's property, but the property of Allum. The court held that the defendant was estopped by his own admissions from denying that the plaintiff had title to the timber. "For," says Lord Chief Justice Tindal, "unless they amount to an estoppel, the word 'estoppel' may as well be blotted out from the law." In the cases cited, as in this case, the plaintiffs had acted on the admissions of the defendants, and had placed themselves in a position different from that occupied by them before the admissions were made. So in this case, acting on the admissions of Hunt, the plaintiff inventoried the slave sued for, as the property of the estate of his testator; and by so doing, rendered himself *prima facie* liable to those interested in the estate for the value of the slave. And it does not appear that he has been discharged from this liability. It is clear from the authorities cited that Hunt is estopped, under this state of facts, from contradicting his admissions, or setting up in himself a title to the slave, which existed within his knowledge, previously to the surrender to the executor.

It is, however, insisted that although Hunt is estopped from setting up a title to the slave existing previously to the surrender to the plaintiff as executor, yet the defendant is not, being a *bona fide* purchaser, without notice of the plaintiff's rights. We think that a person claiming title under one who is estopped will also be bound by the estoppel, unless the

estoppel is fraudulent: *Sikes v. Basnight*, 2 Dev. & B. L. 157; *Phelps v. Blount*, 2 Dev. L. 177.

The result is, that the judgment must be reversed, and the cause remanded.

ESTOPPEL ARISES FROM ADMISSIONS OR REPRESENTATIONS, WHEN: See *Selma & T. R. R. Co. v. Tipton*, 39 Am. Dec. 345; *Carter v. Darby*, 50 Id. 156; and the note to *Dezell v. Odell*, 38 Id. 631. The subject of estoppels in pais is discussed at length in the note to *Welland Canal Co. v. Hathaway*, 24 Id. 51.

RECORD OF JUDGMENT IS NOT EVIDENCE of any matter which from the judgment itself is to be inferred by argument; the principal case was cited to this point in *Strauss v. Meertief*, 64 Ala. 311.

DOSS v. CAMPBELL.

[19 ALABAMA, 590.]

ON MARRIAGE, LEX LOCI CONTRACTUS GOVERNS RIGHTS which each party takes in the property of the other, and which either owned at the time of the marriage; and if by the laws of that state the husband acquires no title in the property of the wife on marriage, their subsequent removal to this state works no change in the title, and gives him no such right in the property that it is subject to execution for his debts.

ERROR to the Dallas circuit court. The opinion states the case.

Campbell, for the plaintiff in error.

Gayle, contra.

By Court, DARGAN, C. J. The slaves in controversy belonged to the wife of the claimant before their intermarriage; they resided in Texas at the time of the marriage, and the wife had the slaves in her possession; they afterwards removed to Alabama, bringing the slaves with them; the husband being in possession of the slaves, they were levied on in this state to satisfy a debt owing by him. It was also shown that by the laws of Texas the husband acquired no title to the property of the wife in consequence of his marriage, but that she retained it to herself as her separate property. Upon these facts, the question arises whether the slaves are liable to the debts of the husband.

We do not deem it necessary to enter into the discussion of the intricate question between real and personal statutes, nor the influence the act of the legislature of Texas would have on the rights of the husband, if it be considered in the one light or the other. For in our opinion, without regard to the character of that statute (that is, whether it be considered as a

real or personal statute), the plain and simple rule is this, the *lex loci contractus* must govern, not only as to the validity of the marriage itself, but also in ascertaining the rights which each party takes in the property of the other, and which either owned at the time of the marriage. But if they remove to another country or state, and there acquire property, the rights of each to such property acquired after the removal must be governed by the laws of their newly acquired home. Thus, if parties are married in a country where the common law prevails, the husband by virtue of the marriage acquires title to all the personal property of the wife which she had in possession at the time of the marriage, and their subsequent removal to a country where the civil law prevails, will not reinvest her with a right to any portion of it, but all the property acquired subsequent to their removal will be governed by the laws of their newly acquired domicile; and she will take the same interest therein as if the marriage had been there celebrated. So, on the contrary, if they were married in a country where the civil law prevails, and afterwards remove to a state governed by the common law, the common law will regulate their future conduct and future acquisitions; but the removal will not alter the rights of either to property then in possession, the title to which had vested under the civil law.

This is the rule recognized in the case of *Gale v. Davis' Heirs*, 4 Mart. (La.) 645; nor is there anything inconsistent with this principle in the case of *Saul v. His Creditors*, 3 Cond. (La.) 563 [16 Am. Dec. 212]. Judge Story, in treating of these two decisions, considers that they recognize this rule: "Where there is no express nuptial contract, the law of the matrimonial domicile is to prevail as to the antecedent property; but the property acquired after the removal is to be governed by the actual domicile:" Story's Conf. L., sec. 1780. This rule is plain and simple, and commends itself for its justice and equity, for there can be no justice in permitting the husband to acquire title to all the property of the wife, simply by a removal from one state to another, especially when we consider that he can control the domicile of the wife. It is true, that if it were contrary to the laws of the actual domicile to allow married women to own property separate from their husbands, then their title to such separate property could not be protected by those laws. But no good reason, in my judgment, can be assigned why the husband should acquire title to all the property of the wife by a removal to a country that recognizes the right of married women to own

separate property. The removal of Campbell and wife from Texas to this state worked no change of title to the property they respectively owned, and the court therefore committed no error in the instructions given to the jury.

The other questions growing out of the assignment of errors, we have examined, and deem it sufficient to say we can perceive no error in the record, and the judgment must be affirmed.

HUSBAND'S RIGHTS OVER WIFE'S PROPERTY, WHAT LAW GOVERNS: See *Kneeland v. Ensley*, 33 Am. Dec. 168; *Allen v. Allen*, 39 Id. 553.

RIGHTS OF SPOUSES ARE NOT REGULATED BY LAWS OF STATE WHERE MARRIAGE CELEBRATED, when it appears that they immediately intend to remove and fix their residence in another state: *Allen v. Allen*, 39 Am. Dec. 553, and note.

EMANUEL v. BIRD.

[19 ALABAMA, 596.]

CREDITORS OF FIRM HAD NO REMEDY AGAINST REPRESENTATIVES OF DECEASED PARTNER, at the common law, on the dissolution of the firm by the death of one of its members, but were compelled to look to the survivors alone for the payment of their debts.

IN EQUITY, PARTNERSHIP DEBTS ARE CONSIDERED JOINT AND SEVERAL, and the joint creditors have the right to proceed against the estate of the deceased partner if the survivors are insolvent.

PARTNERSHIP AND SEPARATE CREDITORS OF DECEASED PARTNER TAKE PARI PASSU where the surviving partners are insolvent, and there is no joint fund to which the partnership creditors can resort.

THOMAS CASEY died and his estate was insolvent. He was a member of the firm of Green, Casey & James, and the surviving partners were proved to be insolvent. The plaintiff, a partnership creditor, filed his claim against the estate, and the probate court decreed that the claim be allowed in case the assets of the estate were sufficient to pay in full the individual liabilities of the deceased, but not otherwise. The plaintiff brought error.

Gibbons, for the plaintiff in error.

William G. Jones, contra.

By Court, DARGAN, C. J. At common law when a partnership was dissolved by the death of one of its members, the creditors of the firm had no remedy against the representatives of the deceased partner, but were compelled to look to the survivors alone for the payment of their debts; and it seems that at one period the same rule prevailed in equity, and that the joint cred-

itors, neither at law nor in equity, had any remedy against the separate estate of the deceased partner: Story on Part., sec. 362. But it is now the well-settled doctrine, that in equity all partnership debts are to be considered joint and several, and thus considered, the joint creditors have the right to proceed in equity against the estate of the deceased partner, if the survivors are insolvent: Id.; Collyer on Part., sec. 580, note. Indeed, it is said in many cases, and by writers of high authority, that the joint creditors may proceed immediately against the estate of the deceased partner, whether the surviving partners are solvent or insolvent: Story on Part., sec. 362; Collyer on Part., sec. 580. But it is not necessary for us to decide in this case that the joint creditors may proceed against the estate of the deceased partner, if the survivors are entirely solvent, and I therefore decline to express any opinion upon it; for it will be seen upon a close investigation of this question, that it is surrounded with much difficulty and embarrassment. But where the surviving partners are insolvent, and there is no joint fund against which the joint creditors can proceed, all difficulty is removed, and the partnership debt being considered in equity as joint and several, the creditor may at once proceed against the estate of the deceased partner. Having the right thus to proceed against the representative of the deceased partner, the question arises, How shall the assets be distributed between a joint creditor and an individual creditor of the deceased, when there is not enough to pay both? The principle is unquestionably settled, that in the administration of the copartnership assets, the partnership debts are to be preferred, and are entitled to priority over the individual debts of the partners. On account of this preference of partnership debts over individual debts, in the administration of the partnership assets, necessarily, in my opinion, results the rule, that the separate creditors are to have priority over the joint creditors, in the administration of the separate estate, so long as there is a joint fund to which the joint creditors may resort for payment; for if we were to allow the joint creditors to come and take *pari passu* with the separate creditors, the fund may be exhausted, leaving the separate creditors unpaid, when all the debts could be paid in full by compelling the joint creditor first to exhaust his remedy against the joint estate, which is primarily liable to pay the partnership debts.

The general doctrine, however, whether founded on this reasoning or not, is this, that the joint creditors have a priority of right to payment out of the joint estate, and the separate

creditors have the like right of priority out of the separate estate: Story on Part., sec. 363. But when there is no joint estate, and the surviving partners are insolvent, then there can be no reason why the separate creditors should be entitled to priority over creditors of the firm; for the debt, though joint at law, is considered joint and several in equity; it is therefore a debt that the deceased partner separately, as well as jointly, owed, and the only ground on which such a debt could be postponed must be, that there was another fund bound for its payment. But when this ground is removed and there is no other fund that can be reached by the joint creditors, there can be no reason in allowing separate creditors priority over them. It appears to be the well-settled doctrine, that in cases of bankruptcy, where there is no joint estate and no solvent partner, the joint creditors may prove their debts against the bankrupt's estate and receive payment *pari passu* with his individual creditors: Story on Part., sec. 363; *Kensington, Taylor, Ex parte*, 14 Ves. 447; *Ex parte Janson*, 3 Mad. 229; *Sadler and Jackson, Ex parte*, 15 Ves. 52. There can, in my opinion, be no other ground on which the joint creditors can be allowed to prove their demands against the estate of a bankrupt and to receive payment *pari passu* with the separate creditors, than this, that in equity the joint demand must be considered as the separate as well as the joint debt of the bankrupt, and there being no other fund out of which it can be paid, justice requires it should be paid *pro rata* with all the other debts of the bankrupt. This reasoning applies with equal force under our statutes regulating the distribution of insolvent estates, for by them all debts are placed on an equal footing and all are entitled to payment *pro rata*. Whenever, therefore, it is ascertained that the claim constitutes a debt that could be enforced against the estate if solvent, it must be paid *pro rata* if insolvent, unless there is a fund to which the particular creditor could resort for its payment, but to which the general or individual creditors could not.

Applying these general rules to the case before us, and independent of our statutes that make all partnership debts at law several as well as joint, we think the orphans' court erred; for the testimony shows that the surviving partners, Green and James, are insolvent, and that there is no partnership fund to which the plaintiff can resort.

It may not be improper to say, that we have decided this case upon its own facts and upon the general principles to which we have adverted, without intending to decide whether a partner-

ship creditor could be permitted to participate in the administration of an insolvent's estate and receive his *pro rata* dividend, if the surviving partner was solvent and fully able to pay.

Let the decree be reversed and the cause remanded.

SEPARATE AND PARTNERSHIP CREDITORS, RIGHTS OF, AS TO PRIORITY OF PAYMENT, GENERALLY: See *Rice v. Barnard*, 50 Am. Dec. 54, and note; *Kirby v. Schoonmaker*, 49 Id. 160, and note. In *Davis v. Howell*, 6 Stew. (N. J.) 74, it was held that on the marshaling of assets of both partnership and separate estates under separate assignments for the benefit of creditors, the partnership creditors are not entitled, after exhausting the partnership assets, to resort to the individual assets until after the creditors' claims have been satisfied; the court referred to the principal case as showing that the rule had not been followed in other states, and said: "But the doctrine is recognized elsewhere, and has been established after thorough discussion and careful consideration."

DECEASED PARTNER'S ESTATE, RIGHTS OF CREDITORS AGAINST, PRIORITY AS TO PAYMENT OUT OF: See *McLain v. Carson's Ex'r*, 37 Am. Dec. 777; *Payne v. Matthews*, 29 Id. 738; *Egberts v. Wood*, 24 Id. 236; *Burgiven v. Hostler's Adm'rs*, 1 Id. 582; *Alsop v. Mather*, 21 Id. 703; *Grosvenor v. Austin*, 25 Id. 743; *Wilder v. Keeler*, 23 Id. 781; *Kirby v. Schoonmaker*, 49 Id. 160.

EQUITY CONSIDERS PARTNERSHIP DEBT AS JOINT AND SEVERAL: *McLain v. Carson's Ex'r*, 37 Am. Dec. 777; see also *McCulloh v. Dashiell*, 18 Id. 271.

BLANN v. CROCHERON.

[19 ALABAMA, 647.]

LIABILITY OF TRESPASSERS IS JOINT AND SEVERAL; the plaintiff may proceed against all or any one at his election, and judgment without satisfaction against one is no bar to an action against the others.

ERROR to the Dallas circuit court. The opinion states the case.

G. W. Gayle, for the plaintiff in error.

Campbell, contra.

By Court, DARGAN, C. J. This was an action of trespass against the defendant for causing an attachment to be levied on one hundred bushels of corn belonging to the plaintiff, which was exempt by law from levy and sale. The defendant pleaded the recovery of a judgment against the constable for levying the attachment, but did not aver in his plea that the judgment had been satisfied. The plaintiff demurred to the plea, but his demurrer was overruled. The plaintiff then replied that the judg-

ment against the constable had not been satisfied. To this replication there was a demurrer, which was sustained, and judgment was rendered for the defendant. The English authorities, it is true, seem to hold that a recovery against one joint trespasser is a bar as to the others, although there be no satisfaction of the judgment recovered: See 1 Ch. Pl. 88, and cases cited in note. But all the authorities agree in this, that the plaintiff is not compelled to sue all jointly; he may do so if he chooses, and if he does, he is entitled to a joint judgment against all: *Layman et al. v. Hendrix*, 1 Ala. 212. But he may sue any one separately without joining the others, and this, to my mind, is conclusive to show that their liability is joint and several, for all or any one may be sued at the election of the plaintiff. If their liability is joint and several, the liability of all must continue until there has been a satisfaction, and judgment without payment can not be a satisfaction.

In the case of *Livingston v. Bishop*, 1 Johns. 290 [3 Am. Dec. 330], it was held that separate actions might be brought against several joint trespassers, in each of which the plaintiff might proceed to judgment, and then elect *de melioribus damnis*, and issue his execution against one, which is a determination of his right to elect, and precludes him from proceeding against the others, except for his costs. The principle decided in this case was again recognized in the case of *Osterhout v. Roberts*, 8 Cow. 43, and the supreme court of Massachusetts admitted the same rule in the case of *Campbell v. Phelps*, 1 Pick. 62 [11 Am. Dec. 139]. So it was said by this court, in the case of *Layman v. Hendrix*, *supra*, that the injured party may proceed against the trespassers jointly as well as severally, but he can not have several satisfactions for the same trespass. This I take to be the correct rule, for the trespassers being severally as well as jointly liable, they can not be discharged from their liability until there is a satisfaction of it, and the mere rendition of judgment, without more, against one joint trespasser, will not preclude the plaintiff from proceeding to judgment against the others. Whether his suing out an execution against the one against whom the recovery was had will be considered as determining his election, and bar a subsequent or another suit against the other joint trespassers, it is not necessary to decide, for there was no execution in this case; but it would seem from principle that nothing but satisfaction could be relied on by one who is jointly and severally liable.

Let the judgment be reversed and the cause remanded.

JUDGMENT AGAINST ONE CO-TRESPASSER, EFFECT OF, AS BAR TO ACTIONS AGAINST THE OTHERS.—In the United States, the rule is settled beyond doubt, that where several persons commit a trespass, their liability is joint and several, and the party injured may maintain an action against any one or more or all at his election: *Mathews v. Menedger*, 2 Mich. 145; *Smith v. Rines*, 2 Sumn. 338; *Barnes v. Viall*, 12 Rep., N. S., 5; *Blann v. Crocheron*, 20 Ala. 320; *Du Bose v. Marx*, 52 Id. 506; *Ayer v. Ashmead*, 31 Conn. 453; *Brooks v. Ashburn*, 9 Ga. 297; *Allen v. Wheatley*, 3 Blackf. 332; *Brady v. Ball*, 14 Ind. 317; *Fleming v. McDonald*, 50 Id. 278; *Elliot v. Porter*, 5 Dana, 299; *Wallace v. Miller*, 15 La. Ann. 449; *Irwin v. Scribner*, Id. 583; *Jones v. Lowell*, 35 Me. 541; *Stone v. Dickinson*, 5 Allen, 30; *Savage v. Stevens*, 128 Mass. 255; *Page v. Freeman*, 19 Mo. 421; *Allen v. Craig*, 13 N. J. L. 294; *Livingston v. Bishop*, 1 Johns. 290; S. C., 3 Am. Dec. 330; *Rose v. Oliver*, 2 Johns. 365; *Guille v. Swan*, 19 Id. 381; S. C., 10 Am. Dec. 234; *Wright v. Lathrop*, 2 Ohio, 33; S. C., 15 Am. Dec. 529; *Jack v. Hudnall*, 25 Ohio St. 255; *Knox v. Work*, 1 Browne, 103; *Floyd v. Browne*, 1 Rawle, 125; S. C., 18 Am. Dec. 602; *Whitaker's Adm'r v. English*, 1 Bay, 15; *De Bruhl v. Parker*, 2 Brev. 406; *Chanet v. Parker*, 1 Mill Const. 333; *Hawkins v. Hatton*, 1 Nott & M. 318; S. C., 9 Am. Dec. 700; *Knott v. Cunningham*, 2 Sneed, 204; *McGehee v. Shafer*, 15 Tex. 198; *Chamberlin v. Murphy*, 41 Vt. 118; *Bloss v. Plymale*, 3 W. Va. 393; S. C., 21 Am. Rep. 214. Freeman, in his work on judgments, 3d ed., sec. 236, says: "The liability of persons joining with one another in the commission of a trespass is joint and several, and the effect of a judgment recovered against them, in merging the cause of action, is, in America, governed by the rules applicable to judgments upon joint and several contracts. The early English and American authorities sustained an opposite conclusion. In England, after some considerable doubt had been manifested upon this question, the courts decided to follow the early decisions instead of concurring in the departure taken by the American courts." As a consequence of the rule above stated, it follows that a judgment rendered against one joint trespasser, but which is unsatisfied, is no bar to other actions for the same injury against the co-trespassers: *Collard v. Del. L. & W. R. Co.*, 6 Fed. Rep. 246; *Lovejoy v. Murray*, 3 Wall. 1; S. C., 2 Cliff. 191; *Du Bose v. Marx*, 52 Ala. 506; *Sheldon v. Kibbe*, 3 Conn. 214; S. C., 8 Am. Dec. 176; *Elliot v. Porter*, 5 Dana, 299; *United Soc. of Shakers v. Underwood*, 11 Bush, 265; *Jones v. Lowell*, 35 Me. 541; *Elliott v. Hayden*, 104 Mass. 180; *Page v. Freeman*, 19 Mo. 421; *Livingston v. Bishop*, 1 Johns. 290; S. C., 3 Am. Dec. 330; *Marsh v. Berry*, 7 Cow. 348; *Wright v. Lathrop*, 2 Ohio, 33; S. C., 15 Am. Dec. 529; *Floyd v. Browne*, 1 Rawle, 125; S. C., 18 Am. Dec. 602; *Hawkins v. Hatton*, 1 Nott & M. 318; S. C., 9 Am. Dec. 700; *Knott v. Cunningham*, 2 Sneed, 204; *Sanderson v. Caldwell*, 2 Aik. 195; *Griffie v. McClung*, 5 W. Va. 131.

In England a different rule prevails, and it is there held that a judgment against one trespasser, although unsatisfied; may be pleaded in bar of another action against a co-trespasser: *Brown v. Wootton*, Cro. Jac. 73; S. C., Yelv. 67; *Lendall and Pinfold's Case*, 1 Leon. 19; *Day v. Porter*, 2 Moo. & R. 151; *Brinsmead v. Harrison*, L. R., 7 C. P. Cas. 547; and this rule was adopted in *Wilkes v. Jackson*, 2 Hen. & M. 355, and *Hunt v. Bates*, 7 R. I. 217. The court, in *Brown v. Wootton*, the leading English case, gave as the reason for this conclusion, that "the cause of action being against divers, for which damages uncertain are recoverable, and the plaintiff having judgment against one person for damages certain, that which was uncertain before is reduced in rem judicatam, and to certainty, which takes away the action

against the others." Justice Miller, in the leading case of *Lovejoy v. Murray*, 3 Wall. 12, commenting on this reason, says: "If the only object, or indeed the principal object, in obtaining a judgment in trespass was to render certain the extent of plaintiff's injuries, or the amount of damages which would compensate for those injuries, we might be able to comprehend the force of this logic. But as it is the purpose of the law, and the main purpose for which courts of justice are instituted, to procure satisfaction for these injuries, we do not see the sequence in the reasoning of the learned judge." The leading case in the United States on this subject, and the one that may be regarded as having settled the law and formed the basis of judicial decision, is *Livingston v. Bishop*, 1 Johns. 290; S. C., 3 Am. Dec. 330. Kent, C. J., in delivering the opinion in that case, said: "On looking into the books, with a view to this question, I was surprised to meet with so much contradiction and uncertainty on the subject. The cases are not all capable of being reconciled to each other, and some of them appear to me not reconcilable with reason. It is, however, a proposition that is not controverted, but everywhere admitted, that for a joint trespass the plaintiff may sue all the trespassers jointly, or each of them separately, and that each is answerable for the act of all. It would seem to result from this doctrine, that a trial and recovery against one trespasser is no bar to a trial and recovery against another. If there can be but one recovery, it is in vain to say that the plaintiff may bring separate suits, for the cause that happens to be first tried may be used by way of plea *puis darrein continuance*, to defeat the other actions that are in arrear."

Several cases, while admitting that the liability of co-trespassers is joint and several, and that the plaintiff may proceed against all or any, at his election, and obtain several judgments against each one, hold that if the plaintiff has obtained several judgments against each one, he must choose the judgment upon which he will issue execution, and that his election will preclude him from proceeding on the other judgments, and hence that while the obtaining of a judgment will work no bar, the issuing of an execution or the order for one may be pleaded as such: *Allen v. Wheatley*, 3 Blackf. 332; *Fleming v. McDonald*, 50 Ind. 278; *White v. Philbrick*, 5 Me. 147; S. C., 17 Am. Dec. 214; see also *Davis v. Scott*, 1 Blackf. 169. The fallacy of such a doctrine is convincingly shown by Freeman in his work on judgments, 3d ed., sec. 236. He there says: "If the mere election to pursue one trespasser were binding on the plaintiff, as a release of all the co-trespassers, it seems difficult to understand why that election is not as obvious when the suit has been prosecuted to final judgment, as when the plaintiff takes the first step towards its enforcement. If, on the other hand, such election in no way involves the several causes of action against the other trespassers, prior to the issuing of an execution, it is difficult to perceive why or how that event necessarily involves them. How vain and delusive that law must be which declares the right of an injured party to proceed severally against every person concerned in committing an injury; which sustains him until the liability of every wrong-doer is severally determined and evidenced by a final judgment; and which, after thus 'holding the word of promise to his ear, breaks it to his hope,' by forbidding him to attempt the execution of either judgment upon penalty of releasing all the others."

WATTS v. STEELE.

[19 ALABAMA, 656.]

FATHER MAY RESORT TO EQUITY TO HAVE ALLOWANCE FOR INFANT DAUGHTER'S SUPPORT and education decreed to be paid out of the income of the estate of the daughter by the trustee of the estate, where, by reason of his poverty and bodily infirmity, he has become unable to support her. INFANT IS NOT NECESSARY PARTY WHERE FATHER RESORTS TO EQUITY FOR ALLOWANCE to be decreed to him for her support and education by the trustee of her separate estate.

ERROR to the chancery court of the second district, held at Monroeville. The opinion states the case.

Watts, Judge, and Jackson, for the plaintiff in error.

No counsel, *contra*.

By Court, CHILTON, J. The question in this case is, whether a father who by reason of his poverty and bodily infirmity has become unable to support his infant daughter, has a right to resort to the court of equity which has appointed a trustee for the estate of the daughter, to have an allowance for her support and education decreed to be paid by such trustee out of the yearly income of her estate. The bill is filed by the father, with whom the daughter lives (the mother being dead), against the trustee. The chancellor dismissed the bill.

We are unable to see any reason why the court should repudiate this jurisdiction over the infant and her estate. There is nothing in the nature of the settlement by which the property was secured to the mother of the daughter, forbidding an allowance for maintenance. The ward has an absolute interest, and the rule is, that where funds are thus situated the court will allow maintenance in the absence of any direction to that effect, and even in disregard of a direction for accumulation; and if an insufficient sum is given for maintenance the court will increase it: *McPher. on Inf. 241*.

As it is the duty of the father to maintain his child when he can do so, he is held liable to account as guardian for the profits of the child's estate which come to his possession during the child's minority. Such being his duty, the courts of chancery originally refused to allow any reimbursement to the father for past maintenance: *Hughes v. Hughes*, 1 Bro. C. C. 387; *Hill v. Chapman*, 2 Id. 231; *Andrews v. Partington*, 3 Id. 60; *Reeves v. Brymer*, 6 Ves. 425 a; *McPher. on Inf. 247*, where the cases are collated. But it is said that in special cases the court may direct an inquiry in favor of the father for past maintenance.

He can not insist on it as a matter of course: *Ex parte Bond*, 2 Myl. & K. 439.

The case before us is for future maintenance and education of the daughter. There can be no question as to the jurisdiction of the chancellor in setting apart a fund for this purpose out of the income of the daughter's estate, if the father be unable to provide for her. When the father is utterly unable to support his children, the law would be inhuman in the extreme to cast them upon the charity of strangers for support while their own property is adequate for their maintenance. But such provision does not depend upon the father's insolvency only, but is made whenever he is unable to give the child an education suited to the fortune which she enjoys or expects: *Buckworth v. Buckworth*, 1 Cox, 80, cited in *McPher. on Inf.* 220. It is said the father's ability is to be estimated comparatively. The amount of his income, the size of the family dependent on him for support, and we might add his physical inability from disease, etc., to exert himself in providing for them, should be taken into the estimate; and if, in view of the circumstances, it should appear to be reasonable to make an allowance, and for the benefit of the infant, the court should order it. And to this end it is proper that the question of the ability of the father, the amount of the ward's income, and the sum required for her support and education, should be referred to the master, if the chancellor is in doubt upon these questions, so that the proper allowance can be made.

We do not think there is any valid objection on the score of parties. The father is a party interested in being provided, as the guardian by nature and nurture, with the means of supporting and educating his child, and is certainly the proper person to superintend her education, unless there be objections to him, and none are pretended to exist in the present case. The trustee who holds the property represents the ward in respect to that. It is not indispensable that the child should be made a party. The court will see to it that her interest is not prejudiced. We find a similar application was heard at the suit of the mother, and a liberal allowance made, in South Carolina: *Mrs. Heyward v. Cuthbert, Ex'r of Heyward*, 4 Desau. Eq. 445, and the principle seems to be sanctioned by several authorities, in the brief of counsel.

Let the decree be reversed and the cause remanded.

MAINTENANCE OF CHILD OUT OF HIS ESTATE WILL BE ALLOWED where he is wealthy and his father is in indigent circumstances: *Myers v. Myers*, 16 Am. Dec. 648.

FREDERICK v. YOUNGBLOOD.

[19 ALABAMA, 680.]

DEED IS CONCLUSIVE EVIDENCE OF TERMS OF SALE, where there is no allegation of fraud, or that any language not truly expressive of the contract had been inserted in the deed, or that any mistake whatever had been made in writing the same; in such a case parol proof contradicting the deed would not be admissible, even in equity.

MEANING OF WORDS "BE THE SAME MORE OR LESS," IN DEED, is that the parties should run the risk of gain or loss, and if the quantity proved greater or less than the quantity sold, the parties should abide by their bargain.

ERROR to the Dallas chancery court. The opinion states the case.

Lapsley and Hunter, for the plaintiff in error.

Stone and Judge, contra.

By Court, **COLEMAN, J.** The bill in this case alleges that on the twenty-fifth of December, 1837, the defendant sold to complainant a tract of land at twenty-four dollars per acre; that defendant represented to complainant at the time of sale that the tract contained five hundred and five acres, but that he would estimate it at five hundred acres, which, at twenty-four dollars per acre, made the total consideration of the sale amount to twelve thousand dollars. One third of this complainant paid in cash, and gave his notes for the balance; that a title to forty acres, part of said tract, had been previously vested in complainant, and on the day of sale he received of defendant a deed for four hundred and sixty-five acres, the remainder of the tract; that about — years after the sale, complainant discovered that there was a deficiency of thirty and eighty one-hundredths acres in the quantity of land so conveyed to him; that on the twentieth of January, 1842, complainant gave his note for a balance due of the purchase money, upon which he has been sued, and prays an injunction for so much as is claimed for said deficiency.

The defendant denies that he represented the quantity of land as above stated, or that he sold it for twenty-four dollars per acre, and avers that it was a sale in gross for twelve thousand dollars, and that the deed for said land which describes the same according to the government surveys, and after stating the number of acres, contains the words "be the same more or less," shows truly the agreement between the parties as to the quantity of land sold; that complainant had lived adjoining said land

for many years, had owned a part of it, and had a better opportunity than defendant of knowing the number of acres. The defendant insists that the complainant has shown so great a want of diligence in suffering nearly ten years to elapse before he set up the deficiency, that he ought not now to be permitted to do it, etc.

We think the testimony authorizes the conclusion, that at the sale of said land, the parties supposed there were five hundred acres in the tract, and that they rated the same at twenty-four dollars per acre, but that there was no stipulation on the part of the defendant as to the quantity of the land. The deed of conveyance in this case must be taken as conclusive evidence of the terms of the sale. There is no allegation of fraud, or that any language not truly expressive of the contract had been inserted in the deed, or that any mistake whatever had been made in writing the same. In such a case parol proof contradicting the deed would not be admissible even in equity. We think that the obvious common-sense meaning of the words in the deed, "be the same more or less," is, that the parties should run the risk of gain or loss, and if the quantity proved greater or less than the quantity sold, the parties should abide by their bargain. In *Jolliffe v. Hite*, 1 Call, 301 [1 Am. Dec. 519], it was held that if the vendor sells a tract of land, so many acres "more or less," and it turns out on a survey that there is less than the estimated quantity, the buyer shall not be relieved in equity. In *Young v. Craig*, 2 Bibb, 270, it was decided that the words "more or less" in a deed were evidences that the parties risked a gain or loss in the estimated quantity, though it is admitted that equity would relieve against fraud or palpable and gross mistake. In both of these cases, the deficiency in the quantity of land greatly exceeded the deficiency in this case.

In *Dozier v. Duffee*, 1 Ala. 320, in a bond for title, the vendor described the land by its appropriate designation in the land office (as in the deed in this case), containing so many acres more or less. The sale embraced a number of tracts sold, and there was no statement at the close of the entire number of acres sold; held, that there was no stipulation or covenant on the part of the vendor of the quantity of acres sold; that it was a sale by metes and bounds, and that no reduction of the price could be had, there being no fraud, for a deficiency in the quantity. The correctness of this decision was fully recognized in the case of *Minge v. Smith*, Id. 419.

Let the decree be affirmed.

PAROL EVIDENCE, ADMISSIBILITY OF, TO VARY OR ALTER WRITTEN INSTRUMENT, GENERALLY: See *Waddell v. Glassell*, *ante*, and note; *West v. Kelly*, *ante*, 192.

CONSTRUCTION OF WORDS "MORE OR LESS" IN A DEED: See *Blaney v. Rice*, 32 Am. Dec. 204; *Bullard v. Coppa*, 37 Id. 561, and note.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

JONES v. ROBINSON.

[11 ARKANSAS, 504.]

OYER NOT HAVING BEEN CALLED FOR, and the defense of payment and the general issue having been interposed, plaintiff need not introduce in evidence the instrument upon which he founds his suit.

IDENTICAL INSTRUMENT SUED UPON, IF PROPERT HAD BEEN MADE OF IT, had, formerly, to be introduced in evidence, but this rule has been modified by our modern practice.

SECONDARY EVIDENCE, AMENDMENT OF DECLARATION.—If defendant had pleaded to issue on its merits, without taking oyer of a bond, upon proof of its loss and destruction, secondary evidence may be introduced without any amendment of the declaration, to prove both its execution and its contents.

FOUNDATION HAVING BEEN LAID BY PROOF OF LOSS OF WRITTEN INSTRUMENT, its contents may be proved by explicit oral testimony.

NOTHING SHORT OF DEMAND OF PAYMENT, REFUSAL, AND NOTICE will fix the indorser; mere notice of non-payment is not sufficient.

NOTE INDORSED AFTER MATURITY, IN ITS LEGAL EFFECT, AS BETWEEN INDORSER AND INDORSEE, BECOMES an inland bill of exchange, payable on demand, and between indorsee and maker, it remains a note payable on demand.

INDORSEE'S UNDERTAKING IS PREDICATED UPON CONDITIONS, and unless they are performed they can not be made absolute, so as to entitle the holder to an action against him. It makes no difference whether the indorsement be made before maturity or afterwards.

NOTE PAYABLE AT DAY CERTAIN, INDORSED BEFORE MATURITY, must be presented on that day to fix the indorser, while the same note, indorsed after maturity, becoming in legal effect payable on demand, need not be presented on any given day.

SAME RULES, AS TO DEMAND AND PROMPT NOTICE, PREVAIL, whether bill be indorsed before or after maturity, or where non-negotiable bill is assigned.

WHAT AMOUNTS TO DUE DILIGENCE IN PRESENTATION OF NOTE, PAYABLE ON DEMAND, depends upon the circumstances of the case.

TIME WHEN PRESENTATION FOR PAYMENT OF NOTE PAYABLE ON DEMAND should be made, is a question of law for the court, based upon the facts proven.

NEGLECT TO PRESENT FOR PAYMENT FOR TWO YEARS after indorsement, without excuse, will release the indorser.

BEFORE SECONDARY EVIDENCE OF CONTENTS OF WRITTEN INSTRUMENT can be introduced, its loss must be established, or if it is in the possession of the adverse party, he must be notified to produce it.

ASSUMPSIT. The record shows, among other facts, that on July 29, 1837, Sharp delivered to defendant Jones his promissory note, due one year after date, of which profert was made in the declaration. In September, 1841, defendant indorsed said note to plaintiff, who immediately demanded payment of Sharp, and payment was refused. The case, afterwards going up on appeal, was remanded, when the defendant pleaded payment and the general issue. The note became mislaid during the above appeal. The remaining facts necessary for a proper understanding of the opinion appear from it.

Fowler, for the appellant.

By Court, Scott, J. The first objection is against the admissibility of the parol evidence allowed to prove the contents of the instrument upon which the action was founded. It is urged that there was no allegation in the declaration for this evidence, and that the profert of the original, that the plaintiff had made in his declaration, had not been covered; consequently his case was not made out as he had alleged it. As to the latter, he was never called on by over to produce the original, and he was relieved from such production in this part of his case by the pleas of payment and the general issue interposed by the defendant: *Taylor, Adm'r, v. Peyton's Adm'r*, 1 Wash. (Va.) 252; and was thus enabled to triumph over a difficulty in his case that was originally considered so insurmountable as of itself to drive the owner of a lost bond into equity for relief.

The next difficulty to be encountered was the necessity of producing the note in order to prove its execution preparatory to its being read to the jury that its contents might be known, and thus to prove his allegation as to its execution by the defendant, and those as to its contents. And so imperious was the rule that the plaintiff must produce the original in order to prove its execution, when in his declaration he has made profert of it, that, although he might prove that the defendant himself

had burned it, the production of the original could not be dispensed with: *Smith v. Woodward*, 4 East, 585; and he would thereby be driven to an amendment of his declaration under the gradual modification of the original doctrine which the good sense of more modern times had effected: 3 T. R. 151, case of *Read v. Ann Brookman*, and cases cited in the third American edition from the fifth London edition.

But in the case before us our statute came to the plaintiff's aid at this point, and relieved him from the necessity of proving the execution of the instrument at all, inasmuch as the defendant filed no sworn plea to bring in issue the execution of the instrument and throw this burden upon him. Thus are all his allegations proven except those relating to the contents of the instrument, and he is neither driven into equity nor to an amendment of his declaration.

But even if our statute had not come to his aid at this point, the case we have already cited from 1 Washington is a direct authority that, if the defendant had pleaded to issue on the merits, without taking oyer of the bond, upon proof of the loss and destruction of the bond, secondary evidence might have been produced, without any amendment of the declaration, to prove both the execution of the bond and its contents, although there was profert; because, as is said by the court in that case, such a "case is completely within the spirit of the modern practice stated in the case of *Read v. Brookman*, 3 T. R. 151, and the notes subjoined."

Then all that remained to be done in the case before us was for the plaintiff to establish the remaining allegations as to the contents of the note by the mere exhibition to the jury of the instrument itself, the execution of which had been established by operation of law, and was in consequence sufficient to establish the remainder of these allegations. And this was done by explicit oral testimony, the foundation for which had been previously laid by proof of the loss of the note long after the suit had been commenced, whereby it appeared that the instrument sued upon was actually in existence at the time of the commencement of the suit; and therefore was within both the letter and the spirit of our statute making such instrument, when the foundation of an action, evidence of its own purport until its execution be denied by sworn plea.

The loss of such instrument thus judicially authenticated as an instrument of evidence competent and sufficient for such purpose, would seem to be as clearly susceptible of being supplied

by secondary evidence as the loss of a record, and there could be no more necessity for a new allegation of the facts to be proven by such instrument so authenticated in which the loss might be incidentally alluded to simply because since the allegation the paper had been burned up, than there would be of facts that could be established by a living witness, and which in consequence of his death would have to be proven by another witness.

We are therefore of opinion that there was no error in the ruling of the court below in allowing the parol evidence as to the loss and the contents of the instrument sued upon, upon the allegations in the declaration without amendment.

The next objection challenges the finding and the judgment thereon of the court as wholly unsustained by the testimony produced to show due diligence. This objection is well based upon authority, and is decisive of the case before us.

It was expressly ruled in the case of *Ruddell and McGuire v. Walker*, 7 Ark. 457, that mere notice of non-payment to the indorser was insufficient to charge him, and that there must also be proof of a demand of payment from the maker of the note or of a legal excuse for not making such demand. And the doctrine of that case is beyond all question sound; all the authorities agreeing that by the law merchant nothing short of demand, refusal, and notice, all in due time, or their legal equivalent, can fix the indorser. And our statute as to the liability of an indorser is but in affirmance of the law merchant as to the indorser's liability: Digest, 163, sec. 9. When a note has been indorsed after its maturity, as in the case at bar, it is in legal effect, as between the indorser and indorsee, an inland bill of exchange payable on demand, while between the indorsee and the maker, it remains a note, in effect payable on demand.

Consequently to charge the indorser it must be presented within a reasonable time after the transfer, and if payment be refused, immediate notice must be given to the indorser, all the incidents of an inland bill payable on demand having place as between these two parties as to due diligence and lawful excuse for want of it: *Mims v. The Central Bank of Georgia*, 2 Ala. 294; *Field v. Nickerson*, 13 Mass. 131; *Colt v. Barnard*, 18 Pick. 260 [29 Am. Dec. 584]; *Van Hoesen v. Van Alstyne*, 3 Wend. 78; *Smith v. Gibbs*, 2 Smed. & M. 479; and this, because the indorser's undertaking is predicated upon conditions, and unless these are performed they can not be made absolute, so as to entitle the holder to an action against him. And in this respect

there is no difference whether the paper be indorsed before its maturity or afterwards: *Kennon v. McRea*, 7 Port. 184, 185; *Berry v. Robinson*, 9 Johns. 121 [6 Am. Dec. 267]; *Stothart and Bell v. Parker*, 1 Overton, 260, and other cases cited in Ch. Bills, 10th Am. ed. from 9th Lond. ed., 223, note 1.

Although there is a difference in another respect, that is to say, when a note is indorsed before due that is payable at a day certain, it must be demanded on the day it becomes due, without regard to circumstances, to fix the indorser; whereas that same note, if indorsed after maturity, need not of necessity be presented on any given day, it having now become in legal effect a note payable on demand.

But whether the paper be indorsed before or after maturity, all the reasons which require demand and notice equally apply, and in each case there is the same necessity for prompt notice of non-payment that the indorser may take measures to secure the payment if the note be dishonored on presentment: *Slossen v. Beadle*, 7 Johns. 72; *Van Hoesen v. Van Alstyne*, 3 Wend. 78; *Stothart and Bell v. Parker*, 1 Overton, 260; Ch. Bills, 379; *Course v. Shackleford*, 2 Nott & M. 283; *Bishop v. Dexter*, 2 Conn. 419. And the same rule prevails where a note not negotiable is assigned: *Aldis and Gadcomb v. Johnson*, 1 Vt. 136; *Berry v. Robinson*, 9 Johns. 121.

And as to what is due diligence and reasonable time in the presentation and demand of paper payable on demand always depends upon the circumstances of the case and the situation of the parties: *Losee v. Dunkin*, 7 Johns. 71; Ch. Bills, 379; *Van Hoesen v. Van Alstyne*, 3 Wend. 79. And although in some cases this is partly a question of fact and partly of law, because the jury have to find the facts, such as the distance at which the parties are from each other, the course of the post, and other circumstances, yet when the facts have been ascertained, the reasonableness of the time is a question of law upon which the judge has to direct the jury, though the judges may take the opinion of the jury as to what is convenient with reference to mercantile transactions. It is, however, now considered as settled law that the time when the presentation for payment must be made is in general a question of law to be pronounced upon the facts proven: Ch. Bills, 380.

In this case, as we shall presently see, the testimony produced to prove notice of non-payment was not admissible; but upon the hypothesis that it was admissible, and that it established distinctly that notice of non-payment was given to the indorser.

and that there had also been proof that immediately preceding this notice there was a presentment of the note, and a demand of payment and refusal, still, under the circumstances and facts shown by the record, there would have been a clear and complete want of such diligence as would have charged the indorser. Nothing would have appeared but an indorsement in September, 1841, and demand, refusal, and notice at some unknown time in 1842 or 1843, and no excuse at all for such gross negligence.

It is perfectly clear, then, that the finding and judgment of the court against the evidence in this case was without testimony to sustain it.

The remaining question relates to the admissibility of parol testimony to prove the contents of the notice to the indorser. There was proof that one copy of this written notice was lost or destroyed, but there was no such proof as to the other copy, nor had the indorser been notified to produce it on trial. One or the other was necessary to authorize secondary evidence of the contents of the paper. The court therefore erred in admitting parol testimony of the contents of the written notice.

For these errors, the judgment must be reversed and the cause remanded to be proceeded with.

VARIANCE BETWEEN INSTRUMENT DECLARED UPON AND COPY, given in answer to a demand of oyer, effect of: See *Auditor v. Woodruff*, 33 Am. Dec. 368, and note.

ADMISSIBILITY OF PAROL EVIDENCE TO PROVE CONTENTS OF LOST WRITING: See *Pruden v. Alden*, 34 Am. Dec. 51, and note.

AS TO WHAT IS NECESSARY TO BIND INDORSER OF PROMISSORY NOTE, see *Taylor v. Snyder*, 45 Am. Dec. 457; *Whittaker v. Morrison*, 44 Id. 627; *Carmichael v. Bank*, 35 Id. 408; *Martin v. Boyd*, Id. 501, and notes; also note to *Allen v. Merchants' Bank*, 34 Id. 310.

INDORSER OF OVERDUE NOTE IS ENTITLED TO REASONABLE DEMAND AND NOTICE: See note to *Chadwick v. Jeffers*, 44 Am. Dec. 260, and cases referred to; see also note to *Baxter v. Little*, 39 Id. 707; also *Kirkpatrick v. McCullough*, Id. 158, and note; *Sanborn v. Southard*, 43 Id. 288, and note.

INDORSEMENT IS CONDITIONAL CONTRACT, and the plaintiff must prove the performance of everything necessary to charge an indorser: *Downs v. Planters' Bank*, 40 Id. 92.

BORDEN v. STATE.

[11 ARKANSAS, 519.]

LAWs ARE EITHER HUMAN OR DIVINE.

DIVINE LAWS are either natural or revealed.

NATURAL LAW is "a rule which so necessarily agrees with the nature and state of man that without observing its maxims the peace and happiness of society can never be preserved."

ALL RIGHTS OF MAN belong to one of two classes, viz.: 1. Natural rights; 2. Acquired rights.

JUSTICE IN JUDICIAL SENSE is nothing more nor less than exact conformity to some obligatory law.

NOTICE BEFORE JUDICIAL SENTENCE has not been consecrated by the common law as a law of nature.

JUDGMENT OF OUTLAWRY was conclusive at common law, and the party could not be heard to prove that he was not outlawed.

IDEA THAT JUDICIAL SENTENCE WAS NULLITY had no place in the ancient common law.

THERE MAY BE LAW PARAMOUNT TO LAW OF NOTICE BEFORE JUDICIAL SENTENCE.

JUDGMENT OF SUPERIOR COURT IS NOT VOID, but only voidable by plea in error.

JUDGES OF SUPERIOR COURTS ARE NEVER TO BE MADE LIABLE, either by civil proceedings or by indictment, for anything done by them in a judicial capacity; but judges of inferior courts are liable when acting beyond their jurisdiction.

DISTINCTION BETWEEN COURTS OF SUPERIOR AND OF INFERIOR JURISDICTION stated.

RULE THAT JUDGMENT OF SUPERIOR COURT IS NOT VOID, BUT VOIDABLE, besides being supported by authority, is supported by a legitimate process of reasoning, predicated upon the foundation, that among the powers vested by law in these courts is the power to decide upon their own jurisdiction.

JURISDICTION "IS AUTHORITY OR POWER which a man hath to do justice in causes of complaint brought before him."

WHETHER THERE HAS BEEN NOTICE OR NO NOTICE before judicial sentence relates not to the investiture of judicial power, but its rightful exercise.

COURTS HAVE POWER TO DETERMINE WHETHER a service of process was sufficient.

WHILE RULE THAT JUDGMENT RENDERED WITHOUT NOTICE IS NOT VOID may be a very general one, it does not embrace every description of case that might possibly arise, as if a circuit court should assume jurisdiction of a case committed by law exclusively to a probate court, or a judgment might even be void under some circumstances from some peculiar and inflexible policy of the law for the protection of infants, married women, idiots, or lunatics.

PROBATE COURTS ARE SUPERIOR COURTS.

WHEN JUDGMENTS OF SUPERIOR COURTS ARE DRAWN COLLATERALLY IN QUESTION, and it appears on the face of them that the court had jurisdiction of the subject-matter, such proceedings are voidable only, although there may be obvious errors.

NOTICE BEFORE JUDGMENT.—A claim was presented in probate court without notice to adverse party, and ordered paid by said court. Sheriff was sued for failure to execute a *fi. fa.* issued upon said order, and upon plea of *nul tiel record*, plaintiff introduced in evidence said order of payment. *Held*, that it was properly admitted, and that jurisdiction of the subject-matter appearing upon the face of said proceedings, the court would not inquire into them collaterally.

PREVIOUS DECISIONS OF THIS COURT AS TO ABSOLUTE NULLITY of the judgments of superior courts when the record fails affirmatively to show previous notice, express or implied, to the defendant, will no longer be regarded as law.

ACTION against Borden, and the sureties on his official bond, as sheriff of Pulaski county. As a breach of said bond, plaintiff alleged that he obtained the allowance of a claim in the probate court of said county against one Woodruff as executor, that Woodruff failed to pay the same, and that plaintiff sued out a *fi. fa.*, which was directed and delivered to said sheriff, and that he failed to execute the same. At the trial plaintiff was permitted, against the objection of the defendant, to read in evidence the record of the allowance of said claim, which it appeared was allowed without any notice to Woodruff. The remaining facts appear from the opinion.

Watkins and Curran, for the plaintiffs.

Fowler, for the defendant.

By Court, SCOTT, J. The main question to be determined in this case is, whether or not the order of payment made in the probate court against Woodruff was a nullity. It is a question of great importance because it involves legal principles upon which some of the fundamental rules of property rest, on the stability of which, in a great degree, depends the repose of the country.

The ground of the supposed nullity of the order in question is the want of previous notice to Woodruff, and of any waiver of such on his part. And it is insisted that in every case a judgment or decree is a nullity, if it has not been preceded by notice, actual or constructive, to the party against whom it is rendered. This position is understood to be based upon a general proposition that such a proceeding would be directly against a law of nature that has been consecrated by the common law and by the immemorial usages of all civilized nations, and is therefore of paramount and universal obligation, and must consequently have resistless sway. Man's laws being strengthless before God's laws, Noy's Maxims, 19, consequently a human law directly contrary to the law of God would be an absolute nullity: Doctor and Student, lib. 1, c. 6.

To sustain the position assumed upon the basis indicated, the most imposing authority is relied upon. Among them Fortescue, who says, in the case of *The King v. Peckham*, Carth. 406: "It is certain that natural justice requires that no man shall be

condemned in judgment without notice." [No such language appears in Carthew's report of this case. Ed. Am. Dec.] And again, in the case of *Rex v. Clegg*, 8 Mod. 4: "As to want of notice, natural justice requires that every man be heard before he be condemned in judgment unless through his own default." And Chief Justice Marshall, in the case of *The Mary*, 3 Pet. Cond. R. 312, said: "It is a principle of natural law of universal obligation that before the rights of an individual can be bound by a judicial sentence, he shall have notice, actual or implied, of the proceedings against him." And Judge Blackstone, in his commentaries, volume 4, page 283, when noticing the necessity of summoning a party defendant to give him an opportunity to defend, says: "A rule to which all municipal laws that are founded upon the principles of justice have strictly conformed; the Roman law requiring a citation at least, and our common law never suffering any fact, either civil or criminal, to be tried until it has previously compelled an appearance by the party concerned." Other authority of like import might be cited, but it is believed these fairly present the character of the whole of such.

In examining the question thus presented and supposed to be sustained, on one side, upon the basis assumed, we shall first inquire whether it be quite accurate to say that notice before judicial sentence is a law of nature, or at least of such universal application as seems to have been supposed, and whether, indeed, the common law has consecrated it as such by a strict conformity to its provisions. If we find it no law of nature at all, we shall be at full liberty to give effect to certain known rules of the common law, although inconsistent with this supposed law of nature. And even if we find it a law of nature, consecrated as such by the common law, nevertheless, if we find these known rules of the common law, to which we have alluded, equally as well authenticated as laws of nature, we will still be at liberty to give effect to them, as well as this supposed law of nature, by construing them all *in pari materia*, as a system of natural laws.

We understand all laws to be either human or divine, according as they have man or God for their author; and divine laws are of two kinds, that is to say: 1. Natural laws; 2. Positive or revealed laws.

A natural law is defined by Burlamaqui to be "a rule which so necessarily agrees with the nature and state of man, that, without observing its maxims, the peace and happiness of soci-

ety can never be preserved." And he says that these are called natural laws, "because a knowledge of them may be attained merely by the light of reason, from the fact of their essential agreeableness with the constitution of human nature; while, on the contrary, positive or revealed laws are not founded upon the general constitution of human nature, but only upon the will of God; though in other respects such law is established upon very good reason and procures the advantage of those to whom it is sent. The ceremonial or political laws of the Jews are of this latter class."

So, all rights which appertain to man are of one or the other of two classes, that is to say: 1. Natural rights; or, 2. Acquired rights. The former are such as appertain originally and essentially to man, such as are inherent in his nature, and which he enjoys as a man independent of any particular act on his side. The latter, on the contrary, are those which he does not naturally enjoy, but are owing to his own procurement. The right of providing for one's preservation is of the one class; while sovereignty, or the right of commanding, or the right to property, are of the other class.

The same author (Burlamaqui) defines "justice in a judicial sense" to be "nothing more nor less than exact conformity to some obligatory law;" and therefore he says that "all human actions are either just or unjust as they are in conformity to or in opposition to law." The doing of justice, then, in a judicial sense, is the performance towards another of whatever is due to him in virtue of a perfect and rigorous right, the execution of which he may demand by forcible means unless we satisfy him freely and with good will. While, on the other hand, the performance of duties due to another only in virtue of an imperfect or non-rigorous obligation which can not be insisted on by violent methods, but the fulfilling of which is left to each man's honor and conscience, are comprehended under humanity, charity, or benevolence, in opposition to justice.

Now, according to these principles and definition which we have laid down from an author of the most unquestionable authority on these points, if it be contrary to natural justice that a man should be condemned without notice and an opportunity to be heard, as is said by Fortescue, such is because it is a principle of natural law, as is said by Judge Marshall, that before the right of an individual can be bound by a judicial sentence he shall have notice, actual or constructive, of the proceedings against him. Because otherwise there could be no

non-conformity to an obligatory law to bring such a human action within the definition of injustice. Such a natural law, then, is assumed by the remark of Fortescue, and its existence is affirmatively asserted by Judge Marshall, with the further remark that it is of "universal obligation."

We would feel that it was presumption in us even indirectly to gainsay these great authorities, if we did not feel sure that they did not use these expressions in a scholastic sense, but only in that loose and general sense in which strong language is often used to affirm the existence of any highly important general rule of very extensive application. We feel, therefore, in what we shall say on this point, that there is more of vindication from heretical inference from these general expressions than of assault, even covert, upon these great names.

It is manifest at a glance that such a law of nature, as that supposed, could have had no operation even if it had existed before the establishment of the civil state, and while man was in a state of nature. Because there was then no human right for such a law to act upon, so far at least as temporal affairs were concerned; no tribunal to enforce its mandates; no individual to claim its protection. In a word, there was no place for its operation among men in their temporal relations towards each other. If then it was a law of nature at all, it was a dormant rule, which, in that condition of man's estate, could never have been derived by the light of reason from "its essential agreeableness to the constitution of human nature." Because in that condition of man there could have been no *data* in the human mind from which reason could have essayed so far into civilization.

Then if a law of nature, it could not have been developed from its dormant condition until after the establishment of the civil state. And then the same process of reasoning that would develop it as such would develop many other rules which would be equally authenticated, none of which, then and so developed, could in the nature of human affairs, with all due deference, be of universal obligation. Because in a state of nature there was no place for right and duty as such rules, and right and obligation are correlative terms. Nor indeed is it at all probable that the most extensive rule that might be developed as a rule of human conduct in the civil state, either by the aid of reason, when exerted in reference to the constitution of human nature and the adventitious state of man's being, or by direct human legislation itself, could be of universal obligation. Because in

the nature of things all such must be subordinate to some inalienable rights which pertain to man alike in a state of nature as when in the civil state, such as the right of self-preservation; and consequently must put a limit to the operation of all rules set on foot by the civil state.

Then if it were conceded that notice before judicial sentence was a natural law, although not developed as such until after the establishment of the civil state, it could not be of universal obligation, even if it was the only law of all nature's enactment that had laid dormant in her chancery until after the establishment of the civil state, which gave occasion for its development.

But we have already remarked that the same process of reasoning which, after the establishment of the civil state would develop notice before judicial sentence, as a law of nature, would develop many other rules which would be equally well authenticated as such. And as civilization and refinement might advance, some of these might be even better authenticated, and therefore of paramount obligation. Not that the laws of nature (if any of these rules deserve that name) are unfixed or vanish before man's progress in the scale of civilization and refinement; but that human affairs by this advancement are ever shifting, and as they pass more or less from the influence of one of these rules, they pass in the same ratio within the more direct influence of another, or else develop a new rule by the same process that those already in existence were developed. And thus it is that some old rules come to have a more circumscribed sphere of action and others become entirely obsolete. When therefore mischief would flow into society by the too general operation of a given rule, there would be the same authority in that society to restrict its operation within conservative limits, either by positive enactment, or else by giving freer, and to this extent paramount, scope to some already existing countervailing rules, that there was in the first place to give sway to the rule thus curtailed; because the badge of its authenticity, which in the first instance consisted in its necessary agreeableness with the nature and state of man, has ceased to accredit it to the full extent of its former operation, although it amply does so to a less extent. And there would therefore be the same authority for thus restricting its operation that there was for its original adoption, and that authority derived from the same source. Nor would any of these rules, or modifications of them, be any the less obligatory merely because they had been called rules of public policy instead of laws of nature, if

they were essentially the same in their nature, and had been derived from the same source and by the same process of reasoning. And we apprehend that all those rules of law which are usually called rules of public policy are of this character, having more or less authority and operation, as the public policy they are designed to sustain is of greater or less import to the community.

Now among these rules that have been and are so to be developed and are thus based, is that which sustains the inviolability of judicial sales; that which covers the officers of the law, judicial and ministerial, with the panoply of its protection, when within the pale of integrity and reasonable diligence; that which looks to the end of strife and the repose of society through the verity of the records of superior courts and the finality of their judgments and decrees when not disturbed by appellate power. And there are many others of like moment designed to sustain the stability of titles to property, a stable administration of justice, and to promote the peace and happiness of the country in general. Now when we consider that the inevitable result of holding notice before judicial sentence to be a natural law is a serious desecration of all these important rules, we have abundant reason to doubt the correctness of such a doctrine. Because, so far from preserving the peace and happiness of society in thus operating, its tendency is in this directly the contrary. For it can not be denied but that, if any serious inroad be made upon these great rules of property and repose, no little encouragement will at once be given to piratical adventures under color of law. The judicial declaration of the nullity of a judicial sentence is far different, in its consequences, from its reversal on error. The latter does not affect titles, nor make innocent men trespassers, nor rob honest purchasers either of their money or the subject-matter of their purchase after having been invited to buy under the sanctity of judicial proceedings. The former does all this and much more, for it strikes a deadly blow at that confidence in and respect for the laws which is the highest guaranty for their enforcement.

Then for any operation to such an extent as this, the rule in question falls far short of the standard of a natural law, and if so to any extent, some of these others must be of paramount import when tried by the same standard. Perhaps, however, it would be more accurate to say that none of these rules are natural laws, although doubtless the rendition of a judicial sentence against a defendant without previous notice, express or implied,

would be a violation of one of the most important principles connected with the administration of justice. Nor have we been able to find that the common law consecrated this rule as a law of nature by a strict conformity to its provisions. On the contrary, there is very conclusive evidence that it could not have been so regarded.

The common-law proceeding of outlawry was inconsistent with such an idea to its full extent. The result of this proceeding was, in the first place, a judicial sentence, by which the defendant incurred a qualified forfeiture of his lands and goods, and a suspension of his civil rights as a citizen; and in the second place it enabled the plaintiff in a civil action, by application to the court of exchequer, or by petition, when his claim exceeded fifty pounds, to obtain satisfaction of his claim by a sale of the property thus seized. And there is a strong case as to a judgment of outlawry cited by the court in the case of *McPherson v. Cunliff et al.*, 11 Serg. & R. 438 [14 Am. Dec. 642], to sustain the proceedings of the probate court as to the sale of real estate when those proceedings were unsuccessfully attacked on the ground that it had proceeded under a total mistake as to the real parties in interest, the court having proceeded under the idea that a family of children, who were really bastards, were the heirs of the deceased. That case is cited from 18 Vin. Abr., tit. Record, C, pl. 2, from Bro. Error, pl. 78: "Record of outlawry of divers persons was certified in the exchequer, among whom one was certified outlawed, and was not outlawed, and that his goods forfeited were in the hands of I. N., and upon process made against him he came and said he was not outlawed, and parcel of the record came by chancery out of B. R. into the exchequer; and Green, justice of B. R., came into the exchequer and said he was not outlawed, but that it was misprision of the clerk. Skipwith said though all the justices would record the contrary, they shall not be credited when we have recorded that he is outlawed. *Quære*: What remedy is for the party? It seems it is a writ of error, inasmuch as there is no original against him, but only record of outlawry without original: Br. Record, pl. 49. And in the same book, pl. 4, cites Bro. Error, pl. 78, it is said the diversity is this, that a man may assign error on a thing separate or out of the record, but he can not falsify it." The custom of foreign attachments, by which goods in the hands of a third person might be sold, or money attached, and unless the debtor appeared within one year and successfully disputed the debt, he was forever concluded as to his rights in

the property or money, was also inconsistent with such an idea to its full extent.

The rule of the absolute verity of the return of the sheriff that he had executed process, although in fact and in truth he had never done so, was directly inconsistent with the idea that notice before judgment was a natural law, because if so, the rule of the verity of the sheriff's return would have been an absolute nullity. An appearance of an unauthorized attorney was of the same class. So was the Scotch law of horning. It was assimilated to the custom of foreign attachments in several respects. There is a case in 4 Bing. 686, *Douglas et al., Assignees, v. Forrest, Ex'r of Hunter*, where, in an action in England on one of these judgments of horning, it was contended that the judgment should be held as a nullity upon the principle of universal justice, as the counsel expressed it, there having been no notice previous to the judgment of horning. But the English court refused to so hold, and said: "On this question we agree with the defendant's counsel, that if these decrees are repugnant to the principles of universal justice, this court ought not to give effect to them. But we think these decrees are perfectly consistent with the principles of justice. If we hold that they were not consistent with the principles of justice, we should condemn some of the proceedings of our own courts."

Finding, then, by this examination upon principle that notice before judicial sentence is no natural law in that sense that human laws would be strengthless before it, and also finding that the common law has not consecrated it as such by a strict conformity to its provisions, we are now at full liberty to examine into the common law for fixed and known principles, if any such there be, which may be inconsistent with the nullity of judicial sentence pronounced without previous notice to the defendant and an opportunity to defend.

If there be such fixed and known rules, and they are well founded in public policy, that look to the stability of titles, the stated, peaceful, and quiet administration of the laws, and to the repose of society in general, they must be considered of paramount obligation, although in their enforcement cases of individual hardship may arise. And this upon the maxim, as old as the common law itself, that a private mischief shall be rather suffered than a public inconvenience—a rule that has application to all public sanctions in government and in legislation, and is plainly recognized in some of the declarations in our bill of rights. And it has never been considered a valid objec-

tion to a rule of public policy that it may produce disadvantages unjustly to an individual, for partial inconvenience is the inevitable consequence of every such rule; nevertheless, the production of the general good authorizes their establishment. Indeed, "partial evil is universal good."

It may be safely assumed that by the ancient common law, the idea that a judicial sentence was a nullity had no place at all; because so long as the king himself sat in judgment, such an imputation would have been a direct invasion of the principle that "the king can do no wrong." Nor subsequently, when his multiplying cases of state induced him to commission judges to dispense justice throughout his kingdom; for they so dispensed justice, not for themselves, but for the king, as the direct representative of majesty in the judgment-seat, and as courts were the repositories of the same judicial powers that had been before in the king, and were to return to him again in his political capacity whenever their commission might come to an end. But after the establishment of inferior courts with limited and special jurisdiction closed to appellate review otherwise than through the powers of superintendency and control assumed by king's bench, and the rule had been adopted as to all such courts to restrict their action within the express and explicit letter of their privileges, 3 Bla. Com., c. 6, p. 85, a foundation was laid for such an idea as to the sentences of these courts, such an idea being a consequence of such a rule as to the action of these courts: because the rule itself was based upon the notion that the judicial powers of these courts derogated from the powers of the common-law courts, not only of those at Westminster, but of all others that were open to the appellate powers of these, and their powers were therefore in their essence limited powers.

But nevertheless there was no ground for any such idea as to all these other courts of record, although some of them were limited in their jurisdiction like these inferior courts to particular subjects, persons, or places; because, although thus limited in their jurisdiction, the judicial powers invested in them were not limited powers, but were of the same class of those with which the courts at Westminster were invested.

Now in order that the rules of which we are in search may be traced to a reasonable source, and thus be authenticated, upon principle as well as by authority, to be fixed rules of the common law, let it be assumed that the brief *exposé* just given of the character of the powers invested in these two classes of

courts is correct; that is to say, that the powers invested in the superior courts were general powers, and those vested in the inferior courts limited powers. And the consequence would be, as to the former, that there could be no defect of power so long as judicial action was confined to a subject within the jurisdiction of one of these courts, and consequently the functionary could never be a trespasser, however contrary to law might be the proceedings on such a subject-matter. But as to the latter there would be a defect of power, not only when the subject might be without the jurisdiction, but also when within it, if the mode of action was without the limits of the defined boundary, and consequently the functionary would be a trespasser whenever the boundary of his powers had been passed, either as to the subject-matter or the mode of proceeding; because when the powers of the functionary ended, the acts of the trespasser began, all acts beyond these powers being but the private acts of a private person.

Accordingly, the doctrine is distinctly laid down by some of the most respectable authorities, that "the judgment of a superior court is not void, but only voidable by plea on error:" 8 Bac. Abr., Void and Voidable, C, p. 170, citing *Prigg v. Adams*, 2 Salk. 674; S. C., Carth. 274; thus an erroneous attainder is not void, but voidable by writ of error: 2 Inst. 184, 2 R. 3 fr. 21, 22. See also 1 Ch. Pl. 181, and cases cited in note t; also 7 Bac. Abr. 67. "The judgments of a superior court are never considered void, and until set aside they are to be considered as regular judgments for every purpose:" *Stebbins Walbridge v. Hiland Hall*, 3 Vt. 114. "A judgment of a court of competent jurisdiction, though rendered in a form of proceeding unknown to our practice and apparently without service of process, can not be treated as a nullity while unreversed:" *Weyer v. Zane*, 3 Ohio, 305. "However summary or irregular the judgment of a competent tribunal may be, it can not be treated as a nullity:" *Buell v. Cross*, 4 Id. 329. "When judgment on a forthcoming bond states that notice was duly proved, it will be taken for granted in the appellate court, unless there be a bill of exceptions showing the contrary; but if the judgment contains no such statement, and the defendant did not appear, the judgment will be reversed as erroneous:" *Beale v. Wilson*, 4 Munf. 380. "An imprisonment under a judgment can not be unlawful unless that judgment be an absolute nullity, and it is not a nullity if the court has a general jurisdiction of the subject, although it be erroneous:" *Ex parte Tobias Watkins*, 3 Pet. 202,

per Marshall, C. J. Nor will such a judgment be the less obligatory because the error is apparent upon the record: *Id.* 207.

And the corresponding doctrine laid down with equal distinctness, "that the judges of the superior courts are never to be made liable, either by civil proceedings or by indictment, for anything done by them in a judicial capacity:" *Hamond v. Howell*, 2 Mod. 218; *Miller v. Seare*, 2 W. Black. 1141; *Groenvelt v. Burwell et al.*, 1 Ld. Raym. 454; S. C., 1 Salk. 396; 1 Swift's Dig. 496; *Reid v. Hood and Burdine*, 2 Nott & M. 168 [10 Am. Dec. 582]; *Young v. Herbert*, *Id.* 172; *Sill v. Phelps*, 1 Day, 315; *Lining v. Bentham*, 2 Bay, 5; *Brodie v. Rutledge*, *Id.* 69; *Seaman v. Patten*, 2 Cai. 312; *Rembert ads. Kelly*, Harp. L. 65, and note. And according to Lord Mansfield, in *Mostyn v. Fabrigas*, Cowp. 172, the same rule applied to every judge of a court not of record, provided such court be "subject to a superior review."

But although this doctrine is thus strongly laid down, and is sustained by unbroken authority, still a judge who would commit a crime, and by a mere evasion endeavor to screen himself under the pretext of exercising his official functions, would doubtless be liable to prosecution. Because Sergeant Hawkins says, and no doubt correctly, in his 6th book, chapter 28, 5, 6: "If the court of common pleas give judgment in an appeal of death, or a justice of the peace on an indictment of high treason, and award execution, both the judge who sentences and the officer who executes may be guilty of felony, because these courts having no more jurisdiction over these crimes than mere private persons, their proceedings are merely void and without any foundation."

But this rule of exemption from liability has never been held applicable to the justices of inferior courts any longer than while they were acting within their jurisdiction, and the reason generally given is that their powers are limited, and the mode of their exercise and the extent of their jurisdiction are marked out and defined. And in looking into this part of the subject, one can not but be struck with the numerous statutes that have been passed in England from time to time for the protection of this class of judicial officers; such as for the limitation of suits against them, provision that they must be previously notified of an intention to proceed against them, declaring that without such notice there shall be a nonsuit, or *nol. pros.*; that such suits shall be brought in particular localities; that these justices may tender amends; that criminal information shall not be allowed

against them except under given circumstances; and others of like character, all designed to abate the rigor of the rule that made them trespassers and liable in most cases practically for the want of intelligence and learning and the errors of an honest judgment.

Now, in order to show the paramount sway of the first of these two great rules of the common law, we will refer to its operation in several cases, where it has been made to override the supposed general rule that every court must have jurisdiction both of the subject-matter of the suit and of the person of the defendant, otherwise its judgments in *personam* will be a nullity. As one of these instances, take the case of *Prigg v. Adams*, already cited from 2 Salk. 674. There the act of parliament erecting the court of conscience in Bristol provided that if any action shall be brought in any of the courts of Westminster upon any cause of action arising in Bristol, and it appeared upon trial to be under forty shillings, that no judgment should be entered for the plaintiff, and "if one be entered it should be void," nevertheless the court of king's bench held that the judgment in the common pleas in this case for five shillings on such a cause of action was not a nullity, but was only voidable by plea on error because the common pleas was a superior court. In this case the want of jurisdiction of the subject-matter was upon the face of the record, and yet the judgment was held not to be a nullity. And it would be no answer to this to show any rule of pleading that might be supposed to have prevented the nullity of the judgment, because any such rule would necessarily presuppose that the judgment was voidable only for the reason that "it is a universal rule in regard to all things that are void that they are as if they had never been: void things are no things:" *Cable v. Cooper*, 15 Johns. 155, citing 22 Vin. Abr. 13, pl. 17.

So the case of *Skillern's Ex'r v. May's Ex'r*, 6 Cranch, 267, rests upon the same foundation. This case had been tried in the circuit court for the district of Kentucky, taken from thence to the supreme court of the United States and reversed and remanded, and being again before the circuit court, it was then for the first time discovered to be a cause not within the jurisdiction of that court, and upon division of the judges as to whether it should be dismissed for want of jurisdiction, that question was adjourned to the supreme court, and after consideration it was determined that the circuit court of Kentucky should proceed with the cause. In this case, then, although

jurisdiction did not appear upon the face of the record, and although the circuit court certified affirmatively that the cause was without the jurisdiction of the court, nevertheless, for the reason that the merits of the cause had been finally decided in the supreme court, its mandate had to be obeyed.

And upon the same foundation it was said by Holt, C. J., in *Domina Regina v. Barnaby*, 1 Salk. 182, that although the justice had no jurisdiction of a prosecution for cutting down trees in the night-time under the statute of 43 Eliz., c. 7, if the defendant had title to the land, and that, upon a conviction in such case, the justice, as well as he who might execute his sentence, would be liable to an action, yet that if the justice's proceedings were confirmed in B. R., in such case no action would lie against either, "for then it is supported by the authority of this court." Here, then, although the justice had no jurisdiction of the subject-matter, yet as soon as his judicial sentence has received the affirmative of a superior court, it has become as valid as it would have been in a case that had actually been committed by law to his jurisdiction, and not excepted out of it as this was, the decision of the latter court having now become the law of the case, to remain so until reversed on error.

In the first two cases, that is to say, the cases from 2 Salkeld and from 6 Cranch, there was no margin for any presumption in favor of the jurisdiction of the court over the subject-matter, because the contrary appeared. In the other case from 1 Salkeld, the principle is that upon a presumption of jurisdiction the superior court would pronounce a judgment that would render it forever afterwards impossible to show anything against the jurisdiction of the inferior court. In all the cases, however, there was in fact and in truth an absolute want of jurisdiction of the subject-matter. They were all cases that had never been committed to these courts respectively by law for their deliberation and adjudication, and were therefore really without their powers. And if it be true that every judicial sentence is *ipso facto* a nullity, unless both the subject-matter and the person be within its jurisdiction, these must all have been nullities. These are therefore cases that go to prove that this proposition, that the decision of a court on a case beyond its jurisdiction is a nullity, although true in the abstract, is to some extent practically false, and is subservient at least to the paramount rule that the judgment of a superior court is not void: and it must be also subject to another paramount rule, that a judgment of a court of record whose jurisdiction is superior and final is con-

clusive to all the world, and puts an end to all inquiry concerning matters decided by it. Because this was the ground upon which the supreme court of the United States refused the writ of *habeas corpus* to Tobias Watkins, although urged to do so upon the ground that the record of the circuit court for the District of Columbia showed upon its face that the offense of which he was convicted was not within the jurisdiction of that court, but without it: *Ex parte Tobias Watkins*, 3 Pet. 193.

Upon the same ground rest the several decisions of the supreme court of the United States, that announce and reiterate the doctrine that although that court will not presume in favor of the jurisdiction of the other federal courts, because they are all courts of limited jurisdiction, and jurisdiction must therefore be alleged in their records, otherwise their proceedings are erroneous; nevertheless, that without such allegation their judgments are not absolute nullities, which may be totally disregarded. And this seems clear from the remark of Mr. Justice Washington, in delivering the opinion of the court in *McCormick v. Sullivan*, 10 Wheat. 192, that these courts "are all of limited jurisdiction; but they are not on that account inferior courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded." And then by the remarks of Mr. Justice Woodbury, in delivering the opinion of the court in the case of *The Bank of the United States v. Moss et al.*, 6 How. 40, when combating the idea that the judgments of these courts, when jurisdiction was not alleged, were nullities, "that this view is supported by the English doctrine. There, though judgments of inferior courts or commissions are often void when on their face clearly without their jurisdiction, and may be proved to be so, and avoided without writ of error: 3 Bac. Abr., Error, A; *Case of the Marshalsea*, 10 Co. 77 a; Hawk. P. C., c. 50, sec. 3; yet the judgment of a superior court is not void, but only voidable by plea on error:" Bac. Abr., Void and Voidable, C; *Prigg v. Adams*, 2 Salk. 674; S. C., Carth. 274.

Nor is this remark of any the less force in showing the ground upon which these decisions rest (that of the distinction between superior and inferior courts as to the conclusiveness of their judgments until reversed), that the particular case upon which Judge Woodbury was remarking had been tried upon the merits, because the principle is the same whether the judgment was rendered upon default or after the trial of issues of fact. No distinction as to this is to be found in any English case; nor,

indeed, could it seem to have any existence anywhere unless it would be conceded that consent could give to a court jurisdiction of a subject-matter that had not been committed to it by law.

If, then, this rule as to the validity of the judgments of a superior court will in some cases override the undoubted rule that to authorize a judgment the court must have jurisdiction of the subject-matter and of the person, so far in some cases as not only to prevent the consequences of the judgment being held void that was rendered by a court having no jurisdiction at all over the subject-matter, but actually to make such judgment perpetually good against all the world, as in cases where the court was not only superior but final in its powers, is it at all more unreasonable, or indeed as much so, that for the mere purpose of preventing the consequences of holding a judgment a nullity, the same rule should be made to override, in cases where the court has undoubted jurisdiction of the subject-matter, that which requires also the jurisdiction of the person? Upon general principles there would seem to be much less difficulty in dispensing with jurisdiction of the person than the subject-matter. For it would seem at first blush almost clear that, if the subject-matter was without the jurisdiction of the court there was no foundation at all for the entire proceeding; and that nothing short of something approaching very nearly to judicial legerdemain could sustain proceedings under such circumstances; while on the other hand, if there was a plaintiff and a declaration, there would seem at least to be one party and a regular complaint against another, and whatever judicial action the court might take on these would be upon a valid foundation.

There would be another general consideration in favor of this view of the matter. Each person within the territorial jurisdiction of a court is subject to its power unless specially exempted, but causes of action are parceled out among different courts. Thus each court has jurisdiction of all persons within its limits unless specially excepted, but of no cause of action not committed to it. Therefore it would seem that there could very rarely be an absolute want of power as to the person, and might often be as to the subject-matter. In other words, under our system all our superior courts have a general jurisdiction as to persons and a limited jurisdiction as to subject-matter, and therefore there should be a more liberal intendment as to the jurisdiction of the person than of the subject-matter. And this

would seem to be the true foundation of the rule that, although a presumption will not be indulged as to the subject-matter, yet presumptions as to jurisdiction over the person will be indulged. And this general view seems not unsustained by the usages of the English courts in sustaining jurisdiction as to the person in some cases upon the ground of native allegiance; in others, upon the ground that the obligation sought to be enforced was contracted within the county; and in others, upon the ground that property had been left in the county under the protection of the laws.

But apart from these general considerations, there would seem to be others, touching the nature of the powers of a superior court and the protection of the judges of these courts, which is said by Chief Justice De Gray to be "absolute and universal," *Miller v. Seare*, 2 W. Black. 1141, that are more conclusive. We have already alluded to the difference between the powers of superior and inferior courts, and shown that those of the latter were essentially limited powers and the former general powers. But the nature of these general powers will be more fully developed by the definitions respectively of superior and inferior courts, given by the supreme court of the United States in the case of *Grignon's Lessee v. Astor et al.*, 2 How. 341; in which case the county court of Brown county, in the then territory of Michigan, was held to be of the former class, and its proceedings, when collaterally assailed, held valid in ordering the sale of lands of an intestate, without notice, either actual or constructive, to the parties in interest, although the statute, under which it proceeded, in express terms enacted that before the court should pass upon the representation of the necessity to sell, "it shall order due notice to be given to all parties or their guardians to show cause against the granting of the license to sell," and providing also publication in a newspaper in case any of the parties were non-residents. The following are the definitions alluded to above: "The true line of distinction between courts whose decisions are conclusive, if not removed to an appellate court, and those whose proceedings are nullities if their jurisdiction does not appear on their face, is this: a court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to a final judgment without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description: there can be no judicial inspection behind the

judgment save by appellate power. A court, which is so constituted that its judgments can be looked through for the facts and evidence which are necessary to sustain it, whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear on the face of their proceedings, or they are nullities." It appears, then, by these definitions that among the powers invested in the courts of the former class is that of deciding upon its own jurisdiction.

The definition of jurisdiction given in Burn's law dictionary, page 407, is this: "Jurisdiction is authority or power which a man hath to do justice in causes of complaint brought before him." And he cites Lilly Abr. 120, where that author remarks: "The courts at Westminster have jurisdiction over all England; all the other courts are confined to their particular jurisdiction, which if they exceed, then whatever they do is erroneous." And Chief Justice Shaw remarks, in *Hopkins v. The Commonwealth*, 3 Met. 462: "The word 'jurisdiction' (*jus dicere*) is a term of large and comprehensive import, and embraces every kind of judicial action upon the subject-matter, from finding the indictment to pronouncing the sentence."

So it is said in *State of Rhode Island v. Massachusetts*, 12 Pet. 718: "Any movement by a court is necessarily the exercise of jurisdiction." And although it is said correctly in *Grignon v. Astor*, 2 How. 338, "where there are adverse parties, the court must have power over the subject-matter and the parties," this is but reiterating the general rule, to which we have already seen there are exceptions, but which is of universal efficiency on a direct proceeding in error for reversal.

Such being the powers of these courts, and such their jurisdiction and its exercise, we will proceed to illustration with a supposed case. Suppose a declaration regularly filed in one of our circuit courts, process of summons regularly issued thereon and returned in proper time, indorsed as follows: "Executed the within writ on the within-named defendant, by leaving a true written copy thereof at his residence, in Washita county, with Sarah Ann, his wife, who is a member of his family over the age of fifteen years." At a proper time during the term, upon calling the defendant and his failure to answer, the plaintiff moves for a judgment by default, whereby, upon inspection of the sheriff's return, the question arises, whether there has been such service as the law requires. There could seem to be no ground of doubt but this would be a clear case

for the exercise of rightful jurisdiction in determining the question whether or not the return, that the copy was left with the defendant's wife, sufficiently showed that the copy was left with "a white person." Because the question legitimately and directly arose in the regular progress of the cause, and when passed upon would seem to be directly within the principle of the *Duchess of Kingston's Case*, 11 Howell's State Trials, 261, restricted in operation in *Scott v. Shearman*, 2 W. Black. 979, to "courts of record having competent jurisdiction of the subject-matter," and afterwards again enlarged in *Gohan v. Maingay*, Irish T. R. 37, 39, 50, after full discussion and examination, to "all courts having competent authority."

When therefore the circuit court should have thus, within its rightful jurisdiction, decided this service of its process sufficient, and had so stated upon its record, it would seem inevitable that a judgment thereupon rendered against the defendant could not be a nullity, but must remain a valid judgment until reversed by appellate power; because the judicial ascertainment of the due service of the process of summons in such a case must be as authoritative as when ascertained by the inspection of a return by a sheriff that he had executed the process upon the defendant in proper person; since in each case the court exercised its competent judicial powers.

And the judgment by default which followed would be equally valid in each case, and would stand upon the same footing in all respects, except that it might be possible that an appellate court might reverse one of them for an erroneous adjudication as to the sufficiency of service, while in the other there would be no ground to suppose it insufficient. In both cases, however, the return of the sheriff was the record evidence, upon the inspection of which the court determined as to the existence of the fact upon which depended its rightful exercise of jurisdiction over the person of the defendant, and having found this fact to exist in the exercise of its power to decide upon its own jurisdiction and so entered it of record, the judgment against the defendant seems necessarily valid until reversed on error.

To determine whether or not the service of the process of summons is sufficient, is certainly, at this stage of the proceedings, as regular and as clearly within the rightful jurisdiction of the court as to these questions as would be decisions as to others at a subsequent stage of the proceedings as to such. In other words, the question presented as to the sufficiency of service is a case as legitimate to call into action the judicial powers

of the court as to that question, as a demurrer to the declaration, interposed by the defendant, would be a case as to questions that would be thus raised. And each would be but different steps taken by the court in adjudicating upon the subject-matter, or "cause of complaint brought before the court," by the declaration which, under our practice, is the first step.

Nor does the service of process of summons upon the defendant, or the determination by the court that it has been properly served, confer any new power upon the court. If so, the court would have power conferred upon it by its own officers and by itself, which would be absurd. The court had already power over the defendant, if within reach of its process, and the process is the instrumentality by which this power can be rightfully exercised. If the power is exercised without the process, it is wrongfully exercised, but not the less exercised because wrongfully exercised. It is still the exercise of judicial power, and the record speaks the verity of its exercise as the sheriff's return of "executed" speaks the verity of service of process, although there may have been in fact no service at all. If a process of summons were executed upon an ambassador, or upon a citizen of another state within his own sovereignty, or a court marshal should have one executed on one not subject to marshal law, all such would be nugatory acts, and there would be no more authority in such courts over such persons than before the service of process upon them. Notice, or no notice, then, can not affect the question of judicial power, but can only relate to its rightful exercise.

The result of this mode of reasoning, then, from the premises that superior courts are invested by law with the power to decide upon their own jurisdiction, is simply the same that is announced by the authorities that we have first cited, that the judgments of such courts are not void, but only voidable by plea on error; and is in exact harmony with that other doctrine, that the protection in regard to the judges of these courts is absolute and universal. And then these three concurring doctrines being thus well sustained by reason, authority, and obvious public policy, and being in direct conflict with the supposed paramount rule that a judicial sentence without previous notice and an opportunity to defend is an absolute nullity, which at most can only work private mischief, we are of opinion that this, although a most important rule of law, must yield to the rule that judgments of superior courts are not void, but only voidable by plea on error.

The consequence is, that if a cause of complaint brought before one of these courts be of a subject-matter actually within its jurisdiction, so as to give a foundation for its proceedings, although in these there may be errors of the most palpable kind, although in the exercise of its jurisdiction over this subject-matter it may have disregarded, misconstrued, or disobeyed the plain provisions of the law, which gave it the power to hear and determine the case before it, nevertheless its judgment is not a nullity which may be entirely disregarded, but must stand and be operative until reversed on error or appeal. And this because, as is said by the supreme court of the United States, in the case of *The United States v. Arredondo et al.*, 6 Pet. 729, "it is a universal principle that when power or jurisdiction is delegated to a public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter, and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the power and authority conferred. The only question which can arise between an individual claiming a right under the act done, and the public or any person denying its validity, are, power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer; whether executive: *Marbury v. Madison*, 1 Cranch, 170, 171; legislative: *McCulloch v. Maryland*, 4 Wheat. 423; *Satterlee v. Matthewson*, 2 Pet. 412; *Providence Bank v. Billings*, 4 Id. 563; judicial: *Perkins v. Fairfield*, 11 Mass. 227; *McPherson v. Cunliff*, 11 Serg. & R. 429 [14 Am. Dec. 642]; adopted in *Thompson v. Tolmie*, 2 Pet. 167, 168; or special: *Rogers v. Bradshaw*, 20 Johns. 739, 740; *Shand v. Henderson*, 2 Dowl. P. C. 521; unless an appeal is provided for, or other revision by some appellate or supervisory tribunal is prescribed by law."

We are fully aware that there are highly respectable authorities, besides some of the previous decisions of this court, which are directly against the conclusion to which we have arrived on the main question; but, with due deference, we think all such have lost sight of the controlling distinction between the judicial powers of superior and inferior courts of special and limited jurisdiction, and the consequent paramount doctrine that the judgment of a superior court can never be a nullity to be entirely disregarded. The English cases usually relied upon certainly afford no just grounds for conclusions opposite to ours, for those cases, like the old case of *Buchannon v. Rucker*,

1 Camp. 63, and the most recent of *Ferguson v. Mahon*, 3 Per. & Dav. 143, having arisen upon actions of *assumpsit* upon foreign judgments, their true doctrine is simply that, to raise an *assumpsit* in law, the party assuming must either directly or indirectly be personally connected with the matter out of which the *assumpsit* is to be raised, all foreign judgments being there regarded as but *prima facie* evidence of debt or duty. And as to American authorities, some of these have been essentially modified; as the earlier by the later decisions in New York: *Footé and Beebe v. Stevens*, 17 Wend. 483; *Hart v. Seixas*, 21 Id. 40; or strongly countervailed by the decisions of other tribunals of higher authority, as the case of *William M. Gwin et al. v. McCarroll*, 1 Smed. & M. 351, by the case of *Grignon's Lessee v. Astor et al.*, 2 How. 319; or are equivocal and evasive. See Mr. Justice Trimble's opinion as judge of the circuit court of Kentucky, quoted *verbatim* and indorsed in gross by the supreme court of the United States, in *Hollingsworth v. Barbour et al.*, 4 Pet. 475.

Nor do any of the cases decided in England or in the supreme court of the United States, where the judgment was declared invalid or null for want of jurisdiction of the person of the defendant, in any degree conflict with our views; for after considerable search, all such cases that we have been able to find were cases in inferior courts, and where there was an absolute want of jurisdiction of the person, as the *Marshalsea Case*, *supra*, which court had jurisdiction of only such as were of the king's household; and this case was not approved in England, and was greatly modified in *Truscott v. Carpenter*, 1 L. Raym. 229, where the court said: "And therefore the resolution in the case of *Marshalsea* was a hard resolution and warranted by none of the books there cited." And the case of *Grant v. Sir Charles Gould*, 2 H. Black. 102, where the prohibition was asked because Grant was not a soldier, and was therefore not liable to martial law; and the case of *Wise v. Withers*, 3 Cranch, 331, where a court-martial had imposed a fine upon a justice of the peace, who, by act of congress, was exempt from military duty, and was consequently not a person over whom the court-martial had any jurisdiction.

We might further fortify our conclusions as to the main point by a further reference to some authorities having some bearing upon it: Bull. N. P. 244, 245; *Meadows v. Duchess of Kingston*, Amb. 761; *Phillipps v. Crawly*, Freem. 84; *Burrows v. Jemino*, 2 Stra. 733; Harg. Law Tracts, 465, 469. And also

by some analogies in reference to the rule of conclusiveness of ecclesiastical sentences, exchequer and admiralty condemnations, and by a reference to the doctrines of the conclusiveness of sales made under decrees and on judgments, and execution on adversary process; and to the doctrine of protection to ministerial officers who issue and execute process, both mesne and final; but we have already protracted our views to an unreasonable length, and conclude as to this point by a brief summary of the grounds of our opinion.

Notice before judicial sentence is not a law of nature; or, at least, not such in a sense that would make a human law non-obligatory, that would circumscribe the sphere of its operation. Nor has the common law consecrated it as such by a strict conformity to its mandates.

Then there may be an obligatory law paramount to the law of notice before judicial sentence.

By the common law the judgment of a superior court is not void, but only voidable by plea on error. This is established, not only by the common-law books, but is also expressly recognized as the common law by the supreme court of the United States.

As a consequence of this law, the judges of these courts are protected absolutely and universally from prosecution or suit for what they do in their judicial capacity.

This rule of law and this consequence from it are reasonably to be accounted for when the origin of these courts is looked at, and the nature of the judicial powers vested in them is considered. The existence of this rule of law and this consequence, besides being thus established by authority, is also further established by a legitimate process of reasoning predicated upon the foundation that among the powers vested by law in these courts is the power to decide upon their own jurisdiction. A direct and emphatic authority for this foundation is the supreme court of the United States in the case cited.

The rule, then, that by the common law the judgments of a superior court are not void, but only voidable by plea on error, being reasonably accounted for by an examination into the origin of these courts, and an examination of the nature of the powers vested in them, and being preserved as a part of the common law in books of the highest authority, and expressly recognized as such by the supreme court of the United States, and sustained by a legitimate process of reasoning from premises laid down by that court in reference to a distinguishing charac-

teristic of superior courts, must be considered as ascertained and fixed law.

This being so, the question is one of precedence. When these two rules of law conflict, which must yield? To this the maxim of the law, that a private mischief shall be rather suffered than a public inconvenience, would seem to give a satisfactory answer. Because the law of notice looks clearly to the protection of private rights, while the law of the validity of judgments until reversed by appellate powers, whilst it also protects private rights, looks emphatically to the effective administration of justice, the sanctity of records, the protection of the ministers of justice, that they may fearlessly discharge their duties, the stability of titles, the end of strife, and the repose of society. And another answer equally conclusive is, that a question whether there has been notice or no notice relates not to the investiture of judicial power, but its rightful exercise.

But although we adopt the rule in question as a very general rule, we do not adopt it or any of the rules with which it harmonizes, or is sustained as universal rules. We are not sure that we know any universal rule of law or that any exists that will have application to every matter that may be brought within the letter of the definition. We are sure this can not embrace every case that might possibly arise that would come within the letter of its description, as we have more than once distinctly intimated in the course of our remarks. If a circuit court were to assume jurisdiction of a matter committed by law to the probate court exclusively, or the county court were to assume jurisdiction of a military officer, or if the probate court were to try and condemn a man for high treason, such proceedings would be all nullities, because there would be no foundation at all for such proceedings: no case had ever been presented to bring into action any judicial power of these courts. So a judgment might even be void, under some circumstances, from some peculiar and inflexible policy of the law for the protection of infants, married women, idiots, or lunatics.

These general observations we make simply to indicate more distinctly our views of the important questions passed upon.

The remaining question before us in this case is whether or not the probate court is to be regarded as a superior court within the principles laid down.

We answer emphatically that in our opinion it must be so considered. Because it is not only a court of record, but a constitutional court of fixed and permanent character, invested with

general jurisdiction and plenary powers over the matters committed by law to its peculiar cognizance, and open to review by appeal. There is abundant authority thus to hold as to this court, and if there was not, it would be a matter of serious public concern. Because, while in point of law it is equal, in point of fact it is a more important court to the people of this state than the circuit court. And this will be manifest at once, when it is considered that it only requires a period of about forty years to pass every atom of property in the state, real and personal, and many choses in action, through the ordeal of the probate court; while it is estimated that the whole would not be passed through the circuit court in an entire century.

We feel freely warranted, therefore, not only on the score of authority, but for cogent reasons of public policy, to fix this court upon the footing of superior courts: *McPherson v. Cunliff*, 11 Serg. & R. 429 [14 Am. Dec. 642]; *Kemp v. Kennedy*, 5 Cranch, 173; *Grignon v. Astor*, 2 How. 340; *Grant v. Raymond*, 6 Pet. 220.

Entertaining these views, and so holding the law as to the two foregoing questions, we have but to say, as to the supposed error in the case before us, that the general and well-settled rule of law in such is that when the proceedings of such a court are collaterally drawn in question, and it appears on the face of them that the court had jurisdiction of the subject-matter, such proceedings are voidable only, although there may be obvious errors, and therefore we can judicially see only what the court has done, and not whether it has proceeded in *inverso ordine*, erroneously, according to the proof before them, or what they have omitted or ought to have done: *Voorhees v. The Bank of the United States*, 10 Pet. 476.

The several previous decisions of this court as to the absolute nullity of the judgments of a superior court, when the record fails affirmatively to show previous notice, express or implied, to the defendant, will no longer be regarded as law, and they are hereby overruled.

And finding in the record that the court had jurisdiction of the subject-matter, and that the orders in question were made, we find no error in the record, and the judgment of the circuit court must be affirmed.

WALKER, J., dissenting.

JUDGMENT WHICH APPEARS FROM RECORD TO HAVE BEEN TAKEN WITHOUT NOTICE is a nullity: *Jones v. Commercial Bank*, 35 Am. Dec. 419, and note; and such a judgment may be attacked collaterally: *Swiggart v. Harber*, 39 Id. 419, and note; *Horner v. State Bank of Indiana*, 48 Id. 355. See also

note to *Bimeler v. Dawson*, Id. 435; *Pelton v. Platner*, 42 Id. 197, and note. For full discussion of subject that notice in general is necessary to the validity of a judgment, see *Flint River Steamboat Co. v. Foster*, 48 Am. Dec. 270, note.

JUDGMENTS ARE CONCLUSIVE UNTIL REGULARLY REVERSED: *Smith v. Tupper*, 43 Am. Dec. 483, and cases cited in note; *Douglass v. Massie*, 47 Id. 375.

JUDICIAL OFFICER IS NOT LIABLE IN CIVIL ACTION, when acting judicially and within the sphere of his jurisdiction: *Stone v. Graves*, 40 Am. Dec. 131, and note; *Barkaloo v. Randall*, 32 Id. 46, and note; *Wilson v. Mayor of New York*, 43 Id. 719, and note 724.

JUDGMENT BASED ON FALSE RETURN: See *Fowler v. Lee*, 32 Am. Dec. 172, and note with references.

JURISDICTION OF PERSONS TO BE BOUND BY JUDGMENT or other determination is acquired by their voluntary appearance in the proceedings, or by the actual or constructive service of process: See *Fisher v. Bassett*, 33 Am. Dec. 239, note; *Ex parte Cheatham*, 44 Id. 525, and note; *Gilman v. Thompson*, 34 Id. 715.

EVERY ACT OF COURT OF COMPETENT JURISDICTION is presumed to have been rightly done until the contrary appears: *Fox v. Hoyt*, 31 Am. Dec. 761; *Adams v. Jeffries*, 40 Id. 477.

THE PRINCIPAL CASE IS CITED in *Hemphill v. Sappington*, 11 Ark. 731; *Biscoe v. Sandefur*, 14 Id. 568; *Ex parte Mar*, 12 Id. 84; *Miller v. Barkaloo*, 18 Id. 292; *Sullivan v. Dealman*, 19 Id. 485; and in *Brumley v. The State*, to the point that the judgment of a superior court is not void, but only voidable by plea in error. It is also cited in *Byers v. Fowler*, 12 Id. 218, where the court hold the same doctrine with regard to the circuit courts of the United States.

SPRING v. BOURLAND.

[11 ARKANSAS, 638.]

REPLEVIN WILL NOT LIE for property held by an officer by virtue of an execution.

REPLEVIN by Nicholas Spring against Alne Bourland, sheriff. Plaintiff in his declaration alleged that the property was taken by said sheriff, and that he still detained the same. Defendant avowed the taking, and justified under an execution directed against the goods of one Waite. Plaintiff's demurrer to said avowry was overruled by the court, and he took this appeal.

S. F. Clark, for the appellant.

Duval, contra.

By Court, Scott, J. This case, it seems from the counsel's brief, has been brought up to induce a review of the doctrine of the case of *Goodrich v. Fritz*, 4 Ark. 525, decided here some years ago; in which it was held that "replevin can not be maintained against an officer who has the custody and possession of

property under a valid execution." That suit, like this, was instituted by a stranger to the execution against a constable.

As to the general proposition of law touching the concurrency of the remedies of replevin and trespass *de bonis asportatis*, the counsel is correct; but he is mistaken in supposing that our entire replevin statute is a literal copy of that of New York. That does not, like ours, prohibit, either by general words or special provision, a stranger to the execution from its use against an officer for property levied upon and in his custody; but simply provides that "no replevin shall be at the suit of the defendant in any execution or attachment," etc.: Rev. Stat. of New York, part 3, c. 8, sec. 5; consequently the cases cited from the New York reports fall short of the point made.

The Kentucky statute as to this was originally like that of New York: Pamph. Acts of Ky., 1830, p. 251; and while in force the decisions of that state corresponded with those cited from the latter state; but in 1842 the legislature of Kentucky repealed her entire replevin statute and enacted a new one, in which it was, among other things, enacted that "no cross-replevin or replevin for property in the possession of an officer by virtue of legal authority, or other person by order, decree, or judgment of a court, shall be brought:" Acts 1842, p. 45, sec. 2. There was no other restrictive or prohibitory clause of any character in the act.

Under this new statute, a defendant in an execution brought replevin against a constable for his only plow-horse, which, by the laws of Kentucky, was exempt from seizure and sale by execution or other legal process. He obtained a judgment in the court below, but the court of appeals reversed it upon the single ground that the language of the statute which we have quoted was broad enough to prohibit all persons whomsoever from bringing the action for property taken and held under color of any valid legal process. And the court, for illustration, cited the case of replevin by a stranger (to an execution) against the officer who might levy on it, as being excluded by this general provision; and as being authorized only in virtue of a subsequent express provision of the statute upon the terms of bond and security conditioned to pay the plaintiff ten per cent. damages in case the stranger failed in his action: *Laffell v. Wash*, 4 B. Mon. 92. This authority sustains the case of *Goodrich v. Fritz*, 4 Ark. 525, and we have found none to the contrary.

The case of *Beebe v. De Baun*, 8 Ark. 563, approved in *Phelan*

v. *Bonham*, 9 Id. 389, cited by counsel as in effect overturning *Goodrich v. Fritz*, *supra*, certainly has no such bearing, and can not be so understood when the remarks of the court are considered with reference to the subject-matter then before them. It is true, so far as the provisions of the statute then under examination by the court were concerned, that the "replevin statute of New York is the original of which ours is a literal copy;" but this is not true as to the provisions of the statute involved in this case, as we have seen. And although the doctrine of *Beebe v. De Baun* greatly enlarges the field for the operation of our statute beyond the limits fixed by the previous cases decided in this court, so far as the subject-matter of a replevin suit is concerned, it certainly does not extend its use to parties to whom it was prohibited by the statute itself, or to a subject-matter excluded by the same prohibition.

Finding, then, the doctrine assailed thus sustained by an authority so respectable as the court of appeals of Kentucky, and being by no means sure but that the will of the legislature has been truly interpreted, we shall hold the case of *Goodrich v. Fritz* as good law. If the practical operation of its doctrine be inconvenient, the remedy is with the legislature, by whom it will be doubtless provided if in their wisdom it shall be deemed proper.

Finding no error in the record, let the judgment be affirmed with costs.

REPLEVIN CAN NOT BE MAINTAINED AGAINST SHERIFF for property taken on execution from the possession of the judgment debtor: *Kellogg v. Churchill*, 9 Am. Dec. 104, and note; *Gist v. Cole*, 10 Id. 616, and note; *Smith v. Huntington*, 14 Id. 331. But the contrary doctrine is maintained in *Dunham v. Wyckoff*, 20 Am. Dec. 695, and extensive note thereto; *Bruen v. Ogden*, Id. 593, and note; *Allen v. Crary*, 25 Id. 566, and note; *Phillips v. Harris*, 19 Id. 166; *Clark v. Skinner*, 11 Id. 302.

THE PRINCIPAL CASE IS CITED AND DISTINGUISHED in the case of *Hershey v. The Clarksville Inst.*, 15 Ark. 128.

WASSELL v. REARDON.

[11 ARKANSAS, 705.]

GENERAL RULE IS THAT AGENTS CAN NOT ACT SO AS TO BIND THEIR PRINCIPALS where they have or represent interests adverse to the principals. AGENT OF BOTH PARTIES.—Plaintiff's attorney, employed to collect a note, was appointed by the defendant with knowledge of the fact, his attorney in fact to confess judgment on said note: *Held*, that the exercise of said power by said attorney was consistent with fair dealing.

POWER TO CONFESS JUDGMENT GIVEN BY DEFENDANT TO PLAINTIFF'S ATTORNEY is a power coupled with an interest, and is irrevocable.

LIMITATION DOES NOT EXTINGUISH CONTRACT, but is a defense in bar to a recovery upon it, and must always be pleaded.

LIMITATION—REVOCATION OF POWER.—A power of attorney to confess judgment upon a note was not exercised until the statute has run against the note: *Held*, that as the limitation does not extinguish the subject-matter the power was not revoked.

HEMPSTEAD & JOHNSON, attorneys at law, were employed by L. J. Reardon to collect two notes against John Wassell. To save costs of litigation, said Wassell, with knowledge of the above facts, executed to said attorneys a power of attorney to confess judgment upon the two notes. In June, 1845, Hempstead & Johnson, in accordance with said power, caused a judgment to be entered, which by reason of some irregularity was defective, and after vainly endeavoring to enforce it, it was dismissed. Upon the above facts, some time in 1849, and after the statute had run against the notes, the said attorneys were permitted to confess judgment, which ruling Wassell now assigns as error.

Fowler, for the plaintiff.

S. H. Hempstead, contra.

By Court, **WALKER, J.** The defendant executed to the plaintiff's attorneys a power of attorney, by which they were empowered to confess judgment for said defendant on a note which the plaintiff had placed in the hands of such attorneys for collection. By virtue of this power, judgment was regularly confessed and entered of record. To this judgment it is objected:

1. That the attorney at law for the plaintiff could not act as attorney in fact for the defendant touching the same subject-matter, on account of his prior retainer by the plaintiff—the interest and rights of the plaintiff and defendant being adverse.

2. That the judgment was not confessed until after the note was barred by limitation, and that it was the duty of the attorney to have interposed this defense.

3. That the power was revoked by the efflux of time.

As a general rule, it is true that agents can not act so as to bind their principals, where they have or represent interests adverse to the principal's. This rule is founded upon the consideration that the principal bargains for the skill and vigilant attention of the agent to the subject-matter intrusted to him; and the policy of the law will not tolerate the existence of an adverse interest in the agent to that of his principal, for fear it may influence his conduct to the prejudice of interests of the principal. This well-recognized rule is particularly applicable to buying and selling agents, where the principal con-

tracts for the services of an agent at a time when he has no interest in the subject intrusted to him, but subsequently, by his own act, acquires interest in it adverse to that of the principal.

In the case before us the attorney had no interest in the matter of his agency unless it should arise from his claim to compensation as a collector, which may or may not have been otherwise settled; nor had the plaintiff any interest whatever in the act to be done of which the principal, at the time he instituted him agent, was not fully advised; and if such disqualification existed, he, by his own act, expressly waived it by conferring upon the agent such power with a knowledge of the facts. When it is remembered that the whole ground upon which this rule is based rests upon the fraudulent advantage which such an interest may stimulate the agent to take to the prejudice of his principal's rights, it will scarcely be contended that the circumstances of this case bring it within the reason and spirit of the rule. The principal was informed of the nature and extent of the interest which the payee in the note had in the act to be performed by the agent. The facts disclosed in the instrument itself prove this; and that it was intended that the act to be performed should inure to the mutual benefit of both the payor and payee: to the first, by saving him the expense incident to a suit in the usual form; to the other, by facilitating and making certain a recovery.

This, therefore, was not a mere naked power, in which the principal was alone interested, but a power coupled with an interest in a third person, made upon good and sufficient consideration, and in regard to which the principal was well advised, and so far from an undue advantage having been taken of him in the relationship in which the agent stood towards him, he only did that which every truthful, honest man should do, and what every prudent, considerate attorney should accede to. The act which the attorney undertook to perform was in perfect harmony with the interest of his client and with the duty and integrity of defendant, the payor.

If the attorney had undertaken to defend for the payor, as it is argued that he should have done, then indeed he would have represented adverse interests inconsistent with those of his principal. But it is evident that such is not the nature of his undertaking. He was not only not authorized to interpose a defense to the action, but the powers conferred upon him negative the idea that any defense existed. Suppose the agent had

offered to defend, and upon a rule to show by what authority he appeared for the purpose of defense, had produced the power of attorney directing him to confess judgment upon the debt, it is evident that such showing would have been held insufficient. We think, therefore, that there was no such adverse interest involved in the act to be done as to disqualify the attorney from confessing judgment.

It is next contended that by the efflux of time the subject-matter of the power was extinguished, and thereby the power was revoked. The effect of limitation is not to extinguish the contract. On the contrary, it is a defense in bar to a recovery upon the contract, which confesses and admits a valid existing contract, which by lapse of time is presumed to have been satisfied. It is invariably required to be pleaded, and will not be otherwise noticed by the court. The case of *Biscoe et al. v. Jenkins et al.*, 10 Ark. 118, relied upon by counsel to sustain their position, was decided under a very different state of facts from those presented in this. The question in that case was not whether efflux of time extinguished a contract, but whether part payment by one of several joint contractors, made after the cause of action had been barred by limitation, would take it out of the operation of the statute as to all.

Lapse of time at most only furnishes presumptive evidence of a revocation by the agent of his power by renunciation, but this, like all the other modes of revocation except that of the death of the principal, applies to mere naked powers over which the principal has absolute control, and not to powers coupled with an interest, or such as are made upon sufficient consideration, or for the mutual benefit of the parties. These are not revocable at the pleasure of the principal: they partake of the nature of contracts, and in cases where there is an interest in the thing itself, the power is not revocable even by the death of the principal, as was decided by this court at the last January term, in the case of *Yeates et al. v. Pryor*, 11 Ark. 58.

Story, in his work on agency, says: "But where an authority or power is coupled with an interest, or where it is given for a valuable consideration, or where it is part of the security, there, unless there is an express stipulation that it shall be revocable, it is from its own nature and character, in contemplation of law, irrevocable, whether it is expressed upon the face of the instrument conferring the authority or not." Story on Agency, 608. So if a power of attorney be given as part of the security to a creditor, the power is irrevocable: *Walsh v. Whitcomb*, 2 Esp.

565; *Hammond v. Allen*, 2 Sumn. 387; or if a letter of attorney is taken to sell a ship as a security upon a loan of money, it is irrevocable: *Hunt v. Ennis*, 2 Mason, 244; or to collect and receive outstanding debts to the benefit of a creditor; and it has also been held that a power of attorney to confess judgment is not revocable: *Oades v. Woodward*, 1 Salk. 87. And so firmly established is the law on this point, that even the death of the principal after the commencement of the term, but before judgment rendered, will not revoke the power to confess judgment: *Fuller v. Jocelyn*, 2 Stra. 882; *Chancy v. Needham*, Id. 1081. Story, in his work on agency, says: "The ground of this doctrine is that the party shall not be at liberty to violate his own solemn agreement, or to vacate his own security by his own wrongful act; for that would be to enable him to perpetrate a fraud upon innocent persons, who have placed implicit confidence in him, which is against the clearest principles of justice and equity:" Story on Agency, 609.

The above remarks of this learned jurist we hold to be peculiarly applicable to the case before us; and after an agreement entered into upon good and sufficient inducements and consideration, and after an indulgence under such agreement, to permit the principal to revoke and set aside his contract and interpose a defense based upon the very indulgence he had acquired under the agreement, would indeed be contrary to the "clearest principles of justice and equity," and an act which we can not sanction.

Whether, if the defendant could show that a valid defense had accrued to him since the execution of the power, the court should not, upon proper showing, permit him to plead, or would consider the power as being revoked by the extinguishment of the subject-matter in regard to which the power was conferred, and refuse to permit judgment to be entered, or would permit the power to be executed and leave the party to his equitable relief before the chancellor, it is unnecessary for us to decide, as no such question is presented in this case. There was no offer made by the defendant in the circuit court either to revoke the power or to interpose a defense. The proceedings are regular, and a valid judgment rendered thereon.

Let the judgment be affirmed, with costs.

AGENT CAN NOT DEAL IN MATTERS OF AGENCY FOR HIS OWN BENEFIT; and where, being employed to purchase property for his principal, he purchases in his own name, equity will declare him a trustee for the principal: *Switzer v. Skiles*, 44 Am. Dec. 723, and cases cited in note thereto.

EFFECT OF STATUTE OF LIMITATIONS IS TO DESTROY REMEDY without impairing the right: *Commonwealth v. McGowan*, 7 Am. Dec. 737; *Ludlow v. Van Camp*, 11 Id. 529, and note; *Belknap v. Gleason*, 27 Id. 721.

STATUTE OF LIMITATIONS MUST BE PLEADED: *Sleeth v. Murphy*, 41 Id. 232, and note; *Koles v. Kelsey*, 47 Id. 661.

FLOYD v. STATE.

[12 ARKANSAS, 43.]

TO ESTABLISH OFFENSE OF FALSE IMPRISONMENT on the part of the state, the state is only required to show the imprisonment.

EVERY CONFINEMENT OF THE PERSON IS IMPRISONMENT, whether it be in a common prison or in a private house, or in the stocks, or even by forcibly detaining one in the public streets.

CHARGE SHOULD BE SET OUT IN WARRANT OF ARREST under our statutes. SECONDARY EVIDENCE, IF NOT OBJECTED TO AT THE TIME, IS COMPETENT to go to the jury, and it is too late to object for the first time in the appellate court.

DEFENDANT PROCURING ARREST WITHOUT ANY LEGAL WARRANT, authority, or reasonable or justifiable cause, is guilty of false imprisonment, although he was not actually present when the arrest was made.

DEFENDANT IN FALSE IMPRISONMENT ATTEMPTING TO JUSTIFY UNDER WARRANT of arrest must produce one that is legal and valid upon its face, and he is not excused from a similar showing where he does not offer the warrant itself, but rests and relies upon proving its contents.

FLOYD was indicted for false imprisonment, and convicted; a motion for a new trial having been overruled, he appealed. The evidence in the bill of exceptions is substantially as follows: One Cook was arrested on some kind of process ordering his body to be taken, and was brought before the justice who issued the process, tried, and on the affidavit of Floyd and the testimony of other witnesses was committed until he gave bond to answer on the charge of removing corn from Floyd's premises. On the trial of Floyd, the original process under which Cook was arrested was not offered in evidence by either side; there was testimony showing that Floyd was not actually present at the time of the arrest, and did not assist in it; there was some conflict as to whether Cook went willingly or not, and desired the arrest; the instruction of the court upon this point appears from the opinion of the court; other evidence is stated in the opinion.

Pike and Cummins, for the appellant.

Clendenin, attorney general, contra.

By Court, JOHNSON, C. J. This is a prosecution for false imprisonment. In order to establish this offense on the part of

the state, she is only required to show the imprisonment, and when that is done, it devolves upon the defendant to prove that he was justified in what he did, and that the imprisonment was lawful. Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets: Arch. Crim. L. 471; 2 Inst. 589; *Hobert and Stroud's Case*, Cro. Car. 210; Com. Dig., Imprisonment. The defendant must either prove that he did not imprison the party, or he must justify the imprisonment: Arch. Crim. L. 471. The argument of the defendant's counsel is, that, inasmuch as trespass will not lie against a party who sues out a regular and valid process, and that as false imprisonment includes a trespass, that therefore false imprisonment can not be maintained under like circumstances. That the doctrine contended for is correct as a general and abstract proposition, we will not at this time controvert; but the question here to be determined is, whether such a state of fact is shown to exist as to make a parallel case, and consequently to warrant the conclusion attempted to be drawn. The charge is, that the defendant did the act complained of without any legal warrant, authority, or justifiable cause. If he has shown, upon the trial in the court below, that he procured the arrest to be made under and by virtue of a regular and valid warrant, we think he has fully answered the charge preferred against him, and that consequently he stands justified in the eye of the law; but if, on the contrary, he has failed to show any legal warrant, authority, or reasonable or justifiable cause whatsoever for the act, it is clear that the defense of justification is not made out, and that as a matter of course the conviction is right.

It is contended that the law does not absolutely require that the charge should be set out in the warrant of arrest. This was true at the common law, but is not so since the passage of our statute. The twenty-first section of chapter 52 of the digest enacts that: "If it shall appear, on such examination, that any criminal offense has been committed, such officer shall forthwith issue a proper warrant, reciting the acquisition and commanding the officer to whom it shall be directed to take the accused without delay and bring him before such officer to be dealt with according to law."

The principle that secondary evidence, if not objected to at the time, is competent to go to the jury, and that it is too late to object for the first time in the appellate court, is a familiar

one, and will not be disputed. But the question here recurs, whether, admitting the whole testimony to be technically competent and legal, it discloses a regular and valid warrant. The substance of the testimony bearing upon this part of the case is, that the special constable arrested Cook under a "process of some kind," which had been issued by a justice of the peace, that the process commanded the officer to take the body, that the arrest was made in the same township in which it was issued, and that the defendant said he was having him arrested to get his rights. Do these facts show that Cook was arrested under a legal warrant? We think not. It is clear that, as the defendant did not offer the warrant itself, but relied alone upon a showing of its contents, he should at least have made it appear that it ran in the name of the state. It may have been "some kind of process," and yet utterly deficient in some of the essential requisites of a valid writ. If he had attempted to justify under the warrant itself, and had offered the warrant in evidence, he most assuredly would have been held to the production of one legal and valid upon its face; and if so, it is manifest that he could not be excused from a similar showing when he rested and relied upon its contents, and that no presumption could obtain in favor of the latter that would not equally hold in respect to the former. From this view of the testimony, we consider it clear that the arrest was made without any legal warrant, and this being the case, the conclusion drawn from a supposed different state of fact can not be upheld. The defendant did not attempt to justify under any other authority, nor did he pretend that such a state of case existed as would have authorized him to do the act of his own accord and without a warrant. It is true that from the testimony it appears the defendant was not actually present when the arrest was made, yet, as he first put the law in motion, and was mainly instrumental in causing the act to be done, we consider him legally liable for the consequences. We have thus disposed of all the questions made by the motion for a new trial which relate to the law and the testimony.

The next and last relates to the finding as squaring with the instruction of the court. The instruction is: "If the jury believe Cook went willingly, and would not have been compelled to go if he had not gone willingly, it is no false imprisonment; but the manner of the arrest be what it may, if the jury believe that Cook had laid a plan to get himself arrested in order to render the persons arresting him liable, it is no false imprison-

ment." The verdict is not believed to be at war with this instruction. It is true that there is some conflict in the evidence in respect to the willingness of Cook to go with the officer, and that conflict the jury were perfectly competent to settle and adjust. This they have done, and found, as they had the right to do, that he was carried against his will. We are therefore of opinion that, from the whole showing of record, the court below committed no error in refusing a new trial, and that consequently its judgment ought to be affirmed. It is therefore considered and adjudged that the judgment of the circuit court of Ouachita county, herein rendered, be, and the same is hereby, in all things, affirmed.

ACTIONS AND PROSECUTIONS FOR FALSE IMPRISONMENT: See *Mitchell v. State*, *infra*, and note discussing this subject at length.

MITCHELL v. STATE.

[12 ARKANSAS, 50.]

IN FALSE IMPRISONMENT IT DEVOLVES UPON DEFENDANT TO MAKE OUT JUSTIFICATION where the fact of confinement has been shown by the state.

DEFENDANT IN FALSE IMPRISONMENT ATTEMPTING TO JUSTIFY UNDER WARRANT must show one valid and legal upon its face.

PERSONS ARE ONLY BOUND TO AID AN OFFICER in such cases as he himself would be authorized to act; they are held to the same strictness of authority as is required of the officer himself, and if the act of the officer is unlawful, any one assisting him is equally liable with him, although he acts by the officer's commands.

THE defendant was indicted for false imprisonment for his conduct in the transaction upon which the indictment of Floyd, in the case of *Floyd v. State*, *ante*, p. 250, was founded. The only facts in addition to those there reported necessary to an understanding of the particular rights of the defendant are stated in the opinion. The defendant was found guilty, and on the denial of a motion for a new trial, appealed.

Pike and Cummins, for the appellant.

Clendenin, attorney general, *contra*.

By Court, JOHNSON, C. J. If any responsibility has attached to the appellant for his participation in the offense charged jointly against himself and others, it must have arisen from a defect of authority to authorize the original arrest. This being the case, it is by no means material whether the warrant of com-

mitment was legal and valid or not. The appellant was not present when the arrest was made, but he was sent for, and came in as one of the aids or guards, after Cook was taken before the justice, and during the investigation, and consequently before Cook was committed.

This being the state of case, the inquiry necessarily results, as to his authority to do the act complained of anterior to the period of commitment. It is true that the testimony does not expressly show that he was ordered by the constable to act as a guard over Cook; yet inasmuch as he had been sent for, and actually took the place of one of the original guards, it is fair to presume that he acted under the authority of the constable, and if so, of course he is entitled at least to the same protection. The language of the witness, in respect to the character of the authority under which the original arrest was made, is precisely the same as that used in the case of *Andrew J. Floyd v. State* [*ante*, p. 250], decided at the present term; and consequently the legal effect must be the same in both cases. It is there laid down that the fact of confinement having been shown by the state, it devolved upon the defendant to make out his justification, and that, having attempted to justify under a warrant, he must show one valid and legal upon its face. It was there held, under a similar state of fact to the one here developed, that one who procured the pretended warrant to be issued had not shown a legal justification, since it did not even appear that the one relied upon ran in the name of the state of Arkansas. All, then, that was said there in respect to the defect of authority, will apply with equal force here, unless there be a distinction between the situation of an informer, who is first instrumental in putting the law in motion, and one who comes in subsequently, and aids in its execution. It is contended by the counsel for the appellant that the law will not hold a party coming in to the aid of an officer to the same strictness of authority as is required of the officer himself. In support of this position, he has submitted a most plausible and forcible argument, in which he has depicted the ruinous consequences which, under peculiar circumstances, the law would visit upon honest and innocent individuals. We are free to admit that the argument is ingenious and plausible, yet we think it will be found that the current of authority is clearly against it.

In the case of *Elder v. Morrison*, 10 Wend. 128 [25 Am. Dec. 548], the supreme court of New York, by Savage, C. J., said: "It is certainly true that if the officer be guilty of a trespass,

those who act by his command or in his aid must be trespassers also, unless they are to be excused in consequence of the provision of the revised statutes. If a stranger comes in aid of an officer in doing a lawful act, as executing legal process, but the officer, by reason of some subsequent improper act, becomes a trespasser *ab initio*, the stranger does not thereby become a trespasser: *Parkes v. Mosse*, Cro. Eliz. 181; *Girling's Case*, Cro. Car. 446. But when the original act of the officer is unlawful, any stranger who aids him will be a trespasser, though he acts by the officer's command: *Oystead v. Shed*, 12 Mass. 511. The case in Massachusetts, just cited, was an action of trespass *de bonis asportatis* against Shed and three others. Shed and Fletcher justified as officers, under writs of attachments, the two other defendants justified as servants of Fletcher: the plaintiff replied, and the defendants demurred to the replications. The court adjudged Fletcher's plea bad, and the justification of the other two defendants failed of course; and their ignorance of the law, it was said, would not excuse their conduct, nor diminish, in any degree, the injury which the plaintiff sustained. The case of *Leonard v. Stacy*, 6 Mod. 140, is to the same effect. That was an action of trespass for entering the plaintiff's house and taking away his goods. The defendant justified that he came in aid of an officer in execution of a writ of replevin. The plaintiff replied that he claimed property in goods, and gave notice to the defendant before their removal. The court held the defendant was a trespasser *ab initio*, for though the claim should be made to the sheriff, yet if it be notified to him who comes in aid, that claim is made, he ought to desist at his peril; thereby establishing the proposition that if the officer is a trespasser, all those who act by his command, or in his aid, are trespassers. Whenever a sheriff or constable has power to execute process in a particular manner, his authority is a justification to himself and all who come in his aid; but if his authority is not sufficient to justify him, neither can it justify those who aid him. He has no power to command others to do an unlawful act; they are not bound to obey, neither by the common law nor the statute; and if they do obey, it is at their peril. They are bound to obey when his acts are lawful, otherwise not. The only hardship in the case is, that they are bound to know the law. But that obligation is universal; ignorance is no excuse for any one. The counsel for the plaintiff in error insists that there is a difference

between aiding in the original taking and in overcoming resistance. It seems to me there is no such distinction. If the taking was lawful, the resistance was unlawful; but if the taking was unlawful, the resistance was lawful. If the resistance was lawful, neither the officer, nor those he commands to assist him, can lawfully overcome that resistance. Nor does the fact of the officer being indemnified confer on him any authority which he had not without such indemnity: he may thereby become compelled to do an illegal act in selling the property of strangers to the execution, but he is a trespasser in doing so, as are all others who aid him."

The case referred to was an action of assault and battery brought by Morrison against Elder in the court below. The defendant pleaded the general issue, and gave notice of special matter. On the trial the following facts appeared: The plaintiff, on the premises of one Milburn, offered for sale two horses at public auction, in pursuance of a previous notice. Woodward, a constable of Walkill, having in his hands a justice's execution against Milburn, was present, and forbade the sale, claiming the horses under the execution, and demanding possession of them, which the plaintiff refused to yield. Woodward demanded assistance from the by-standers; no one obeying him, he called upon the defendant, by name, to assist him in obtaining possession of the horses, and threatened him with legal proceedings if he did not obey. Woodward succeeded in obtaining possession of one of the horses, and then he (the plaintiff) and defendant went into the stable, where the other horse was, upon which a struggle ensued as to who should have the possession of that horse, in the course of which the defendant jerked the plaintiff about, who had hold of the halter, which was upon the horse, elbowed him, and threw him down, which was the assault and battery complained of. The defendant, under the notice attached to his plea, proved the rendition of a judgment against Milburn, the issuing of an execution thereon, and a delivery of the writ to Woodward, and that by virtue thereof, and of another execution subsequently received, Woodward, who was indemnified by the plaintiff in the execution, sold the horses. At the time of the levy, Woodward inquired of Milburn where his horses were, who pointed out the horses in question. The plaintiff offered to prove that he was the owner of the horses at the time of the taking by Woodward, which evidence was objected to by the defendant, but the objection was overruled and

the evidence received; to which decision the defendant excepted. The jury found a verdict for plaintiff, with twenty-five dollars damages, on which judgment was rendered.

The defendant then sued out a writ of error, and the judgment was affirmed in the supreme court. The principle there established is, that a party who is called to aid an officer in the execution of civil process does so at his peril, and that in case he shall invade the rights of strangers, he will be liable as a trespasser. That is a much stronger case than the one at bar, for he is not only bound to know that his principal is acting under lawful authority, but he is also bound to see that such authority is not abused by an invasion of the rights of strangers to the process under which he acts. It is conceded that the phraseology of the statute of New York is somewhat different from that of our own, yet we believe that they are substantially the same, and that consequently they should receive the same construction. The statute of that state bearing upon the subject under consideration is, "that when a sheriff or other public officer shall find resistance, or have reason to apprehend it, in the execution of any process delivered to him, he may command every male inhabitant of his county, or as many as he shall think proper, to assist him in overcoming such resistance, and in seizing and confining the resisters," and that "every person commanded by an officer to assist him, who shall refuse, without lawful cause, shall be deemed guilty of a misdemeanor, and subject to fine and imprisonment." The language of our statute is, that "in all cases where by the common law or any statute of this state any officer is authorized to execute any process, he may call to his aid all free white male inhabitants over the age of twenty-one years, of the county in which such officer is authorized to act," and "if any person shall refuse or neglect to obey the summons of any such officer, the person so neglecting or refusing shall be fined in any sum not less than ten nor more than one hundred dollars, to be recovered by indictment." In the one case, therefore, the party summoned is bound to obey unless he shall have lawful cause to refuse; and in the other he is only required to yield obedience in such cases as the officer is authorized to act, either by the common or statute law. If he is only bound to obey in such cases as the officer is authorized to act, we think it clearly follows that the law will not protect him where the officer has no authority. It certainly would not be contended that an officer of the state with a process in his hands against one individual would be authorized to execute it upon

another, neither would he be authorized to seize in execution the property of a stranger to satisfy the debt of the plaintiff in the writ.

It is assumed by the appellant's counsel that the party called upon by an officer is bound to obey, and that having no option whether he will do so or not, he must, of necessity, be protected against any evil consequences which may result from his acts. If the premises were true in point of fact, it might be difficult to resist the conclusion drawn from them. But such is not the case. The law, as laid down in the case just referred to, is that "he has no power to command others to do an unlawful act; they are not bound to obey, neither by the common law nor the statute; and if they do obey, it is at their peril. They are bound to obey when his commands are lawful, otherwise not. The only hardship is, "that they are bound to know the law." It will be seen, therefore, that a party is not bound, right or wrong, and whether the officer is authorized to do the act or not, to render obedience to his command. It is most clearly his right to refuse in case the officer has no legal authority to do the act, and it is equally clear that he has no such right in case the officer has such authority. He must, therefore, act or decline to act at his peril. If it be a hardship for a person, called by an officer to assist him, to decide at his peril, it is quite as hard that the rights of innocent individuals should be invaded with impunity. The law does not intend that the assistance required shall, in all cases, be rendered blindly and without reflection; for if so, it might be the means of inducing the most flagrant outrages, and covering with the mantle of impunity acts of violence preconcerted between an irresponsible officer and other malicious individuals.

If persons are only bound to aid an officer in such cases as he himself would be authorized to act, it is clear that the defendant in this case can claim no protection from the law, as nothing has been shown which could by possibility have given protection to the officer.

We are, therefore, fully satisfied from every view which we have been able to take of this case, that the judgment of the circuit court is right, and consequently ought to be affirmed. It is, therefore, considered and adjudged that the judgment of the circuit court of Ouachita county, herein rendered, be, and the same is hereby, affirmed.

FALSE IMPRISONMENT is "the wrong of arresting, confining, or detaining an individual without lawful authority to do so:" Abb. Law Dict., tit.

False Imprisonment. Addison, in his work on torts, vol. 2, sec. 798, defines it as a "trespass committed by one man against the person of another, by unlawfully arresting him, and detaining him without any legal authority." But the definition which covers most completely the mass of cases which have arisen under this branch of the law is that of Hilliard, who says that "false imprisonment is the unlawful restraint of a person contrary to his will, either with or without process of law:" 1 Hilliard on Torts, 208. The *gravamen* of the offense is the unlawful detention of another without his consent. The malice of the party detaining or causing the detention does not enter into consideration in this action: *Akin v. Newell*, 32 Ark. 605; *Chrisman v. Carney*, 33 Ark. 316; *Bailey v. Wiggins*, 1 Houst. 299; *Colter v. Lower*, 35 Ind. 285; S. C., 9 Am. Rep. 735; *McQueen v. Heck*, 1 Coldw. 212; *Brown v. Chadsey*, 39 Barb. 253; on the contrary, one who participates in, or encourages or instigates, an arrest is liable, however pure his motives: *Chrisman v. Coney*, *supra*. Although, however, the question of malice does not figure in determining the offense itself, it is often an important factor in assessing the damage, as will be seen by a reference to the division of this note entitled "Damages," *post*. The action of trespass for false imprisonment also differs from other actions of trespass in this, that the trespass does not consist in a distinct and single act, but in the continuous violation of a person's liberty, and every continuation of the illegal imprisonment constitutes a new trespass for which an action may be maintained: *Ruffner v. Williams*, 3 W. Va. 243. We will next proceed to a consideration of what acts constitute false imprisonment, and then to actions growing out of these acts.

ACTUAL IMPRISONMENT IS NOT NECESSARY TO CONSTITUTE OFFENSE.—As Blackstone says: "To constitute the injury of false imprisonment, there are two points requisite: 1. The detention of the person; and, 2. The unlawfulness of such detention. Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets:" 3 Bla. Com. 127; and see *Floyd v. State*, 12 Ark. 43; S. C., *ante*, 250. It is not necessary that violence should be used, or that there be a manual or corporal touch: *Hawk v. Ridgway*, 33 Ill. 473; *Moses v. Dubois*, Dudley (S. C.), 209; *Brushaber v. Stegemann*, 22 Mich. 266; *Gold v. Bissell*, 1 Wend. 210; S. C., 19 Am. Dec. 480; *Searls v. Viets*, 2 Thomp. & C. 224; it would be enough to restrain the liberty of the person: *Id.*; or to detain him in any manner from going where he wished to go, or to prevent him from doing what he desired: *Hawk v. Ridgway*, *supra*; without detaining him in any particular spot: *Wood v. State*, 3 Tex. App. 204; *Harkins v. State*, 6 Id. 452. The offense might be committed by the restraining of a person in his own house, in preventing him from moving around at will: *Warner v. Ridgford*, 4 C. B., N. S., 206; *Sorensen v. Dundas*, 7 N. W. Rep. 259; and a detention effected by means of threats may amount to a false imprisonment: *Herring v. State*, 3 Tex. App. 108; as where they are such as to form a well-grounded apprehension of personal danger: *Johnson v. Tompkins*, 1 Baldw. 571. And a demonstration of physical violence, which to all appearances can only be avoided by submission, operates as effectively, if submitted to, as if the arrest was forcibly accomplished: *Brushaber v. Stegemann*, *supra*; and the threats need not be express, but may consist of acts, gestures, or the like: *Maner v. State*, 8 Tex. App. 361. Words, even, might constitute an imprisonment, if they interpose a restraint upon the person: *Pike v. Hanson*, 9 N. H. 491. And it would be a sufficient arrest when one, being informed by an officer that he has a warrant for him, submits to such officer's control: *Van Voorhees v. Leonard*, 1 Thomp. & C. 148. So where an attorney's clerk ac-

accompanied the creditor to his debtor, and pretended that he was a sheriff's officer, and in consequence the debtor went away with him, not willingly, but supposing they had power to compel him, this would be a sufficient arrest to support an action of trespass for false imprisonment, although no writ was produced, and it did not appear that either creditor or clerk touched the debtor: *Wood v. Lane*, 6 Car. & P. 774. But it was held in *Bird v. Jones*, 7 Q. B. 742, where the plaintiff attempted to pass in a particular direction, and was obstructed by the defendant, who prevented him from going in any direction but one, not being that in which he had endeavored to pass, that this did not amount to an imprisonment; and this, whether the plaintiff had or had not a right to pass in the first-mentioned direction (Denman, C. J., dissented). And an action for this offense can not be maintained by proof that the defendant by misrepresentations, threats of criminal prosecution, and the payment of money for expenses, but without using or threatening force, induced the plaintiff to go to another place and remain in concealment for a time: *Payson v. Macomber*, 3 Allen, 69. And if a person voluntarily places himself in a situation where another may do that which has the effect of restraining his liberty, he can not complain that he is unlawfully imprisoned, especially if he refused to depart when he may, as where he boarded the defendant's steamer just as she was about to leave the wharf: *Moses v. Dubois*, *supra*. In *Marshall v. Heller*, 55 Wis. 392; S. C., 14 Rep., N. S., 575; S. C., 13 N. W. Rep. 236, it was held that an instruction to the jury that false imprisonment was any unlawful restraint of a man's liberty, by words and an array of force, without bolts or bars, in any locality whatever, although theoretically correct, was under the circumstances of the case misleading.

DETENTIONS BY CORPORATIONS.—An action of trespass for false imprisonment lies against a corporation: *Owsley v. Montgomery etc. R. R. Co.*, 37 Ala. 560; S. C., Ala. Sel. Cas. 485; if the act is committed by authority, and the authority need not be under seal; but it lies on the plaintiff to give evidence justifying the jury in finding that the company's servants who imprisoned, or some of them, had authority from the company to do so: *Goff v. Great N. R'y Co.*, 30 L. J., Q. B., 148. In *Lynch v. Metropolitan Elevated R'y Co.*, 24 Hun, 506; S. C. affirmed, 90 N. Y. 77; S. C., 43 Am. Rep. 141, the plaintiff entered one of the defendant's cars at Forty-second street, New York city, and while attempting to pass out of the station at Rector street was stopped by a gate-man who demanded his ticket; upon being told by the plaintiff that he had purchased a ticket but had lost it, the gate-man detained him, and finally sent for a policeman, who arrested him on a charge of disorderly conduct and refusal to pay his fare, and took him to a station-house, where he was detained over night. Next morning he was examined before a police magistrate, and discharged. The defendant had instructed its gate-man to compel passengers to produce tickets on leaving the station, and it was held that the detention and arrest were illegal and were false imprisonment, and that the defendant was liable for the acts of its gate-man: See also *Goff v. Great N. W. R'y Co.*, 30 L. J., Q. B., 148; *Murdock v. Boston & A. R. R. Co.*, 133 Mass. 15; and *Chilton v. L. & C. R. Co.*, 16 Mee. & W. 231, all cases turning on the detention of passengers for the alleged non-payment of fare. In the last case it was held that a statute authorizing a railroad company to make by-laws for the government of their affairs, and to impose "reasonable fines and forfeitures" upon all persons offending against the same, not exceeding five pounds for each offense, did not authorize a by-law by which each passenger not producing or delivering up his ticket on leaving the company's train was compelled to pay fare from the place where the train started,

and did not justify the passenger's arrest. But where a station-master, without any authority from the company, and where no authority can be implied, arrests and detains a passenger for an alleged non-payment of the carriage of a horse, and in a case where the company would have had no power to detain the passenger, the company will not be liable for the wrongful detention, and the only remedy the plaintiff would have would be against the station-master personally: *Poulton v. L. & S. W. R. R. Co.*, L. R., 2 Q. B., 534.

CONFINEMENTS IN INSANE ASYLUMS.—One can not be lawfully detained in an asylum against his will: *Van Deusen v. Newcomer*, 40 Mich. 90; although in that case the court were equally divided on the point as to whether a superintendent is liable for detaining a sane person whom he believes to be insane. A person procuring the confinement of another in an insane asylum is only justified where the person was in fact a lunatic; consequently, in an action for procuring such a confinement, a plea that the plaintiff had conducted himself as a person of unsound mind, and incapable of taking care of himself, and as a proper person to be detained under due care and treatment, and that two medical certificates to the effect that the plaintiff was of unsound mind, and ought to be taken charge of, had been duly given as required by statute, and that the defendant had reasonable cause and did believe the certificate to be true, and the plaintiff to be a person of unsound mind and dangerous to be at large, so defendant, the uncle of the plaintiff, and a proper person to act in that behalf, caused him to be confined, is bad: *Fletcher v. Fletcher*, 28 L. J., Q. B., 134. A declaration alleging that the defendants, practicing physicians, did falsely and maliciously certify in writing under oath that they had examined into the state of the health and the mental condition of H. L. F., and in their opinion she was insane, and a fit subject to be sent to the insane asylum, by means of which false certificate the defendants, wrongfully and without reasonable cause, procured the arrest of H. L. F., does not show a legal cause of action, as it fails to aver that the defendants actually procured the arrest, and discloses no facts from which it appears that the false certificate had been the means of procuring the arrest; there being no logical connection between the wrongful act imputed to the defendant, viz., the making the false certificate, and the consequence attributed to it: *Force v. Probasco*, 43 N. J. L. 539; S. C., 25 Alb. L. J. 476. In an action against the superintendent, for the false imprisonment of a patient in an asylum, the broadest latitude should be allowed in showing the jury what the patient said or did, and how she appeared, where there are facts bearing on the question of her sanity; but evidence of her worldly circumstances, and what she did with her goods, and as to what happened to her before she was received at the asylum, is inadmissible, as is evidence to show what the servants or inmates of the institution said or did to her, unless it was said or done by the superintendent's directions, and that money had been sent to her which she did not receive, unless it was also shown that it came to the defendant, or that he was instrumental in depriving her of it: *Van Deusen v. Newcomer*, 40 Mich. 90. Where the answer in an action for procuring a confinement in a mad-house sets up that the defendants, in obedience to the legal requirements, attended a court before which the plaintiff's sanity was being tried, and there gave their honest opinion that he was insane, and that their opinion was based in part upon observations of his actions, conduct, and habits, a bill of particulars requiring the nature, time, and place of such actions and of defendant's observations should not be granted: *Higgenbotham v. Green*, 13 N. Y. Week. Dig. 13.

RESTRAINTS BY MILITARY AND NAVAL OFFICERS, AND DURING STATE OF WAR.—Trespass for false imprisonment will not lie in favor of a minor against an officer enlisting him and commanding him in the army, although the consent of parents is not given in writing: *Boutwell v. Thompson*, Brayt. 119. In this action, the fact that the acts complained of were committed by the defendants while in the service of the Confederate States is no defense: *Caperton v. Martin*, 4 W. Va. 138; *Caperton v. Nickel*, Id. 173; *Caperton v. Bowyer*, Id. 176; *Caperton v. Ballard*, Id. 420. And a party engaged in a raid by Confederates is liable as a joint trespasser to one who is captured by them, although he was not present at the taking, he being with the party that captured him at camp on the night of the capture, and along with the squad that took him to Richmond for a considerable portion of the time and distance traveled by it: *Cole v. Radcliff*, Id. 332. A military officer stationed on the line of the territory is justified in seizing a person who is transporting property towards the enemy's province under circumstances creating a reasonable suspicion that he was about to carry the same to the enemy: *Clow v. Wright*, Brayt. 118. An order commanding the arrest and detention of deserters, and specifying persons who are authorized to make such arrests, should be strictly construed, and with the precise limitations which it prescribes. Such an order should not be held to mean that persons named therein may perform the special duty conferred, as they might some others, by procurement or delegated authority, and the giving authority in such an order to the sheriffs to make the arrest will not authorize a deputy sheriff to arrest deserters: *Trask v. Payne*, 43 Barb. 569. And where an officer arrested plaintiff on a charge of aiding and abetting deserters, without a warrant, but under verbal orders from his commanding officer, evidence that the plaintiff had, during the rebellion been engaged in procuring men to enlist in the army, and to desert after obtaining their bounty, is admissible in mitigation of damages, although it was not known until after the commencement of the suit: *Beckwith v. Bean*, 98 U. S. 266. If the written order for the arrest of deserters is lost, evidence of its contents is admissible: *Teagarden v. Graham*, 31 Ind. 422; and see that case as illustrating when an officer holding an order for the arrest from the proper authorities is justified in arresting one as a deserter from suspicious circumstances. Although an order issued from the proper authorities to an officer of a company of state militia for the arrest of certain supposed disloyal persons alleged to be connected with the assassination of some government officers might not excuse or justify such officer, still it would be admissible to palliate their acts and mitigate the damages: *Carpenter v. Parker*, 23 Iowa, 450. In an action against a Confederate for a false imprisonment committed by him during the war, he can not put in evidence a pardon granted him by the president of the United States, granting amnesty for all offenses committed by him arising from his participation in the rebellion: *Caperton v. Martin*, 4 W. Va. 138. A colored sergeant in garrison, and on duty adjoining an incorporated city, may arrest a person standing outside the garrison and in the streets of the city, who is using loud and abusive language towards him, as he is charged by the laws of the United States with the good order and discipline of the fort: *Oglesby v. State*, 39 Tex. 53. Where a person residing within the limits of a military company, and enrolled in it, enlisted into a fire company in this state, authorized by law, and was subsequently fined for non-performance of duty by the commander of the former company, and imprisoned on a warrant for such fine, it was held that the remedy of such person was by excuse and appeal, and he could not maintain trespass against the officer: *Merriman v. Bryant*, 14 Conn. 200. A military

officer ordering the arrest and confinement of an individual is bound to see that his subordinates, to whom the execution of his orders is intrusted, use no unnecessary severity or cruelty in carrying it into execution. He is liable in damages for oppressive or undue harshness practiced by them through his neglect to superintend their course: *McCall v. McDowell*, 1 Abb. 212; although mere words will not justify an assault and battery and false imprisonment, yet seditious language used by the person arrested, of a gross and violent character, and which influenced the making of the arrest, may be proved in mitigation of damages: *Id.* Except in a plain case of an excess of authority, where at the first blush it is palpable to the commonest understanding that an order given is illegal, a military subordinate should be held excused in law for acts done in obedience to orders of his commander: *Id.* The president of the United States, whether in his civil capacity or as commander-in-chief of the army and navy, has no power, during a rebellion or insurrection, to arrest or imprison, or authorize another to arrest or imprison, any person not subject to military law, without any order, writ, precept, or process of some court of competent jurisdiction; and any claim to such power is so destitute of color that it can not constitute a case arising under the constitution of the United States so as to give original jurisdiction to federal courts: *Jones v. Seward*, 40 Barb. 563. Trespass is maintainable in the courts of a state against an officer of the navy for an illegal assault and imprisonment of one of his subordinates, although the act was done on the high seas, and under color of naval discipline: *Wilson v. Mackenzie*, 7 Hill, 95.

ARRESTS UNDER PROCESS AND IN JUDICIAL PROCEEDINGS.—By far the greater number of cases have arisen under this branch of the subject. For convenience of reference we will treat of the liability of each party in the procuring, issuing, or execution of the process, separately and

a. *Liability of Magistrate or Person Committing Plaintiff to Prison.*—The subject of the personal liability of judicial officers for acts done in their official capacity is discussed generally in the note to *Yates v. Lansing*, 6 Am. Dec. 303, and is also treated of in the note to *Bissell v. Gold*, 19 Id. 480. One of the rules laid down in the note to the latter case, page 490, is that a justice of the peace or other inferior magistrate is personally liable if he acts without his jurisdiction and another is injured by the act. This rule applies with particular force to the case where one is arrested on the procurement of a justice so acting without his jurisdiction. Such a justice is liable to action for false imprisonment by the party injured: *Wait v. Green*, 5 Park. 185; *Dyer v. Smith*, 12 Conn. 384; *Reynolds v. Orvis*, 7 Cow. 269; *Sheldon v. Hill*, 33 Mich. 171; *La Roe v. Roeser*, 8 Id. 537, as where he issues a search-warrant for stolen goods without the oath required: *Grumon v. Raymond*, 1 Conn. 40; or issues a warrant without a complaint justifying it: *Poult v. Slocum*, 3 Blackf. 421; or where the warrant is not valid on its face, although he acted *bona fide*, and there was sufficient proof before him to have authorized his issuing a valid warrant: *Blythe v. Tompkins*, 2 Abb. Pr. 468; but a mere informality in the warrant, if the justice had jurisdiction, will not support an action: *Cooper v. Adams*, 2 Blackf. 294. And where the facts set forth in an affidavit for an arrest in a civil action, though slight and inconclusive, yet tend to prove the charge and justify the order of arrest, after an examination thereof, no action lies: *Gillett v. Thiebold*, 9 Kan. 427; and in *Rogers v. Mulliner*, 6 Wend. 597 (cited in 19 Am. Dec. 491), it was held that a justice was not liable for issuing a warrant without an oath against the freeholder, where it was not shown that he acted *mala fide*. And so it was said that a complaint alleging a criminal offense, on information and belief, without

stating any facts, gives a justice jurisdiction to issue a warrant, and although he errs grossly in exercising that jurisdiction, he is not liable: *Campbell v. Ewalt*, 7 How. Pr. 399; but *Comfort v. Fulton*, 13 Abb. Pr. 276, held that a magistrate had no authority to issue a warrant in a criminal case upon a complaint, the facts of which were stated on information and belief, if the attendance of the person from whom the information was derived can be procured. And in *Wasson v. Canfield*, 6 Blackf. 406, it was held that a plea by a justice, in an action against him, that he had been informed that the plaintiff committed a crime, is bad for not showing that the informant stated facts by which he knew or believed the plaintiff to be guilty, and for not setting out those facts in the warrant. But mere errors in judgment, if the court has jurisdiction, does not subject him to responsibility: *Stanton v. Schell*, 3 Sandf. 323. And if he has jurisdiction, defects or irregularities in the *mittimus* will not render him liable: *Heard v. Harris*, 68 Ala. 43; *Bean v. Crosby*, 1 Allen, 220. A commitment to jail to be tried by a called court, upon a charge of an intention to commit a felony, is wholly illegal: *Streshley v. Fisher*, Hard. 249. And to take up and remand a man to another state upon the prosecution for the maintenance of a bastard is false imprisonment in the justice: *Burlingham v. Wylee*, 2 Root, 152; so would it be if a justice ordered a person accused of a criminal offense to be committed until a subsequent day for examination without the accused being first brought before him: *Pratt v. Hill*, 16 Barb. 303; but a justice may commit the mother of a bastard child to prison for her refusal to discover the putative father: *Scott v. Ely*, 4 Wend. 555. If a justice instigates a constable to execute a state's warrant for felony, nine months after it had issued, from motives of personal ill-will, the party who procured the warrant in the first instance, having made no application to have it executed, he is liable: *Garvin v. Blocker*, 2 Brev. 157, as he would be where he committed a party to jail upon a *mittimus*, whom he had fined and permitted to go at large for the purpose of extorting money from him: *Fisher v. Deans*, 107 Mass. 118; or issued a warrant for the purpose of collecting his own debt: *Dyer v. Smith*, 12 Conn. 384. In an action for issuing a warrant for an offense committed out of the state, it is only necessary to show the fact that the defendant knew that fact when he issued the warrant: *Miller v. Grice*, 2 Rich. L. 27; S. C., 44 Am. Dec. 271. And in an action for a commitment for a certain alleged offense, proof of plaintiff's conviction for an offense different from that recited in the commitment is no defense: *Rogers v. Jones*, 3 Barn. & Cress. 409; but where a person was convicted before a trial justice of two distinct offenses, and committed to the house of correction under two warrants, one legal and the other illegal, and he was held in custody under both warrants during the whole time of his imprisonment, the justice, if liable at all for issuing the illegal warrant, is liable only to nominal damages: *Doherty v. Munson*, 127 Mass. 495. The warrant under which the false imprisonment takes place, produced on the trial by a plaintiff, is evidence of the facts contained in it until gainsaid by proof: *Scott v. Ely*, 4 Wend. 555. Where a justice is charged with false imprisonment, under color of legal process, the warrant under which the arrest was made being set out in the indictment, he is not entitled to a continuance on account of the absence of a witness by whom he expects to prove a parol commitment of the person arrested for contempt of court; nor would he be to a right to appear and be heard before the grand jury at the time the true bill was found: *Campbell v. State*, 48 Ga. 353.

b. *Liability of Party Procuring Arrest or on Whose Evidence Warrant Issued.* A person who procures the arrest of another under a warrant or execution

unlawfully issued is guilty of false imprisonment, and liable to an action for the offense: *Floyd v. State*, 12 Ark. 43; S. C., *ante*, 250; *Hackett v. King*, 6 Allen, 58; *Wilson v. Robinson*, 6 How. Pr. 110; *Chapman v. Dyett*, 11 Wend. 31; S. C., 25 Am. Dec. 598; *Roth v. Smith*, 41 Ill. 314; *Stoddard v. Bird*, Kirby, 65; *Vredenburg v. Hendricks*, 17 Barb. 179; *Halleck v. Doming*, 7 Hun, 52; *Fletcher v. Fonell*, 11 Rep., N. S., 584; *Devoe v. Davis*, 12 N. Y. Week. Dig. 544; *Barnes v. Viall*, 12 Rep., N. S., 5; *Curry v. Pringle*, 11 Johns. 444; *Sleight v. Leavenworth*, 5 Duer, 122; *Halliday v. Noble*, 1 Barb. 137; *Deyo v. Van Valkenburg*, 5 Hill, 242; *Letaler v. Huntington*, 24 La. Ann. 330; *Gee v. Patterson*, 63 Mo. 49; *Emery v. Hapgood*, 7 Gray, 55; *Painter v. Ives*, 4 Neb. 122; *Fellows v. Goodman*, 49 Mo. 62; *Gibbs v. Randlett*, 58 N. H. 407; *Diehl v. Friester*, 37 Ohio St. 473; *Bonesteel v. Bonesteel*, 28 Wis. 245; S. C., 30 Id. 511; *Pier-son v. Gale*, 8 Vt. 509; *Allison v. Rheam*, 3 Serg. & R. 139; S. C., 8 Am. Dec. 644; *Hauss v. Kohlar*, 25 Kan. 640; S. C., 20 Am. L. Reg., N. S., 625; *Develing v. Sheldon*, 83 Ill. 390; *Clifton v. Grayson*, 2 Stew. 412; *Findlay v. Praitt*, 9 Port. 195. And mere good faith in making an affidavit on which a warrant of arrest was issued will not excuse one: *Painter v. Ives*, 4 Neb. 122. And a person in whose benefit a warrant or *ca. sa.* issues may be liable, though he might not be active in procuring it, if he approved of it: *Fenelon v. Butts*, 53 Wis. 344; *Webber v. Kenny*, 1 A. K. Marsh. 345; and see *Patterson v. Prior*, 18 Ind. 440; as if an attorney should illegally issue an execution against the person, the client is thereby rendered liable: *Guilleaume v. Rowe*, 63 How. Pr. 175. But it was held in *Kimball v. Molony*, 3 N. H. 376, that when the body of a person not liable to arrest was taken upon *mense process* trespass would not lie for such arrest against the party at whose instance the action was instituted. And it was said in *Landt v. Hiltz*, 19 Barb. 283, that an order of arrest made by a judge having jurisdiction, and whose duty it is to act, protects the party applying for it, and all persons acting under it; and this, whether the judge decided correctly or not in holding that it was a proper case for granting an order of arrest; that if he was called upon to make a determination of the question, that was enough: See also *Brown v. Crowl*, 5 Wend. 298. And one procuring the arrest of another by a lawful warrant is not liable, although he obtained the warrant by misrepresentation: *Coupal v. Ward*, 106 Mass. 289. And one acting *bona fide* on finding that the bail taken in a civil suit is insufficient may discontinue it, and arrest the defendant again on a second writ for the same cause of action: *Jewett v. Locke*, 6 Gray, 233. So a person at whose instance a writ is issued is not liable for the mistakes of the justices, or irregularities, or for misconduct of the sheriff in the service not instigated by himself: *Adams v. Freeman*, 9 Johns. 117; *Taylor v. Trask*, 7 Cow. 249; *Stanton v. Schell*, 3 Sandf. 323; *Roth v. Smith*, 41 Ill. 314; see also *Wagstaff v. Schippel*, 27 Kan. 450. And one who in good faith merely states the case or makes an affidavit or swears to a complaint on which the warrant is issued is not liable: *Fenelon v. Butts*, 49 Wis. 342; *Von Latham v. Rowan*, 17 Abb. Pr. 237; *Murphy v. Walters*, 34 Mich. 180; *Von Latham v. Libby*, 38 Barb. 339. Nor can a member of a committee who have counseled and advised an arrest to be made which is illegal be held in trespass unless it be shown that he acted with them: *Develing v. Sheldon*, 83 Ill. 390. And if a debtor arrested on execution and discharged out of custody is again arrested and imprisoned on an *alias* execution issued on the same judgment, by direction of the creditor, trespass will not lie for the second imprisonment: *Mason v. Sewall*, Brayt. 119; and as a defense to the allegation that the defendant had no claim against the plaintiff, and consequently his arrest in a civil suit was illegal, it is enough for defendant to show that he had a cause of action

against the plaintiff for a breach of contract, though the damages might be nominal merely: *Gordon v. Upham*, 4 E. D. Smith, 9. And one suing before a justice of the peace and arresting the plaintiff is not liable in trespass for the arrest because from the absence of the justice at the return day the action is not entered: *Shaw v. Reed*, 16 Mass. 450. A release of a claim for a false imprisonment obtained by duress is void: *Guilleaume v. Rowe*, 14 N. Y. Week. Dig. 196. A defendant in this action may plead in defense a discharge executed by the plaintiff to others who were jointly liable with him: *Stone v. Dickinson*, 7 Allen, 26. This subject is also treated of in the note to *Bissell v. Gold*, 19 Am. Dec. 480, to which the reader is referred.

c. *Liability of Officer Executing the Writ*.—It is a well-settled rule of law that an officer to whom a writ or warrant has been directed is not liable to an action for false imprisonment, if he obeys the precept of the writ, if the writ is in the legal form and issues from a court having jurisdiction of the subject: *Clinton v. Nelson*, 2 Utah, 284; *Wheaton v. Beecher*, 49 Mich. 348; *Donahoe v. Shed*, 8 Met. 326; *Wilmarth v. Burt*, 7 Id. 257; *Herzog v. Graham*, 9 Lea, 152; *Chase v. Fish*, 16 Me. 132; *Slomer v. People*, 25 Ill. 70; *Ressler v. Peats*, 86 Id. 275; *Johnson v. Von Kettler*, 66 Id. 63; *Wooster v. Parsons*, Kirby, 110; *Trammell v. Russellville*, 34 Ark. 105; S. C., 36 Am. Rep. 1; *Boaz v. Tate*, 43 Ind. 60; *Sleight v. Ogle*, 4 E. D. Smith, 445; *Landt v. Hilts*, 19 Barb. 283; *Allison v. Rheam*, 3 Serg. & R. 139; S. C., 8 Am. Dec. 644. It is not necessary to a constable justifying under a writ of *cap. ad resp.* issued by a justice that the writ be preceded by an affidavit: *Davis v. Bush*, 4 Blackf. 330; and an officer holding a writ in the common form issued by a court having jurisdiction against a defendant who had been discharged under the insolvent laws, after the judgment on which the execution issued was rendered, is not liable to an action of trespass for arresting and committing such defendant, although he shows his discharge to the officer before he is arrested: *Wilmarth v. Burt*, 7 Met. 257; and on an arrest of the plaintiff on an attachment as a creditor in proceedings supplementary to an execution issued by a special county judge, a stay of proceedings on the attachment does not affect the right of the officer to detain the plaintiff so as to insure his presence before the special county judge when the case would be in a condition to be heard: *Lewis v. Penfield*, 39 How. Pr. 490; and where an execution debtor refuses to turn out property when demanded, declaring at the same time the proceedings were illegal, the officer is excusable if he levies on the body, although the debtor may have had abundant personal property: *Allen v. Gleason*, 4 Day, 376. But it is one of the risks and hazards of a sheriff's office that the sheriff is to determine at his peril whether he can or not detain a party in custody under a certain writ or process, and if he arrests and detains one under an illegal writ or one issuing from a court having no jurisdiction of the subject-matter, he is liable to an action for false imprisonment: *Fischer v. Longbein*, 62 How. Pr. 238; S. C., 10 Abb. N. C. 128; *Johnson v. Von Kettler*, 66 Ill. 63; *Gold v. Bissell*, 1 Wend. 210; S. C., 19 Am. Dec. 480; *Barhydt v. Valk*, 12 Wend. 145; S. C., 27 Am. Dec. 124; *Abbott v. Booth*, 51 Barb. 546; *Harwood v. Siphers*, 70 Me. 464; *Pearce v. Atwood*, 13 Mass. 424; *Gorton v. Frizzell*, 20 Ill. 291; *Stoyel v. Lawrence*, 3 Day, 1; *Peck v. Rorks*, 22 Ark. 221; *Blythe v. Tompkins*, 2 Abb. Pr. 468; *Grumon v. Raymond*, 1 Conn. 40; *Sheldon v. Hill*, 33 Mich. 171; *Moore v. Watts*, 1 Ill. 42. Thus the renewal of a justice's execution must be signed by the constable, or the officer executing is a trespasser: *Barhydt v. Valk*, 12 Wend. 145; S. C., 27 Am. Dec. 124. And it is no defense to an officer that he supposed he had a *capias* when he arrested the plaintiff; and his drunkenness at

the time is no defense, but might be regarded as an aggravation of damages: *Hall v. O'Malley*, 49 Tenn. 70. An officer arresting a debtor under an execution, and afterwards discharging him upon his exhibiting a writ of protection and returning the execution unsatisfied, without stating the arrest in his return, can not justify under the execution: *Munroe v. Merrill*, 6 Gray, 236; nor can a sheriff rearrest the defendant against whom an order of arrest has been issued, upon a notice of plaintiff that he does not accept the bail offered: *Arteaga v. Flack*, 13 Rep., N. S., 630; so an attachment against the person for a contempt issued by the register of the court is invalid and no justification: *Thompson v. Ellsworth*, 39 Mich. 719; and a warrant issued on a verbal order will not justify an arrest: *State v. James*, 78 N. C. 455; but mere informalities or irregularities in the writ or *mittimus* will not subject the sheriff to an action: *Cooper v. Adams*, 2 Blackf. 294; *Poor v. Taggart*, 37 N. H. 544; *Bean v. Crosby*, 1 Allen, 220; but in an action for false imprisonment the constable can not justify under an execution regular upon its face, where he committed the debtor in a different county from the one in which the arrest was made, when there is a legal jail in the latter county, although the commitment be made in the county commanded in the execution: *Clayton v. Scott*, 45 Vt. 386; and as to the effect of the arrest of the prisoner in another county, see *Ressler v. Peats*, 86 Ill. 285; *Krug v. Ward*, 77 Id. 603; *Francisco v. State*, 24 N. J. L. 30; *Green v. Rumsey*, 2 Wend. 611; *Galliard v. Laxton*, 31 L. J., M. C., 123; *Love v. Humphrey*, 9 Wend. 204. As to the effect of arresting the wrong person under a writ, see the note to *Eanes v. State*, 44 Am. Dec. 289. A sheriff detaining a prisoner on mesne process, after his discharge by the plaintiff, is liable: *Withers v. Henley*, Cro. Jac. 379; and for cases involving the question as to the liability of a jailer or warden to imprisonment, the reader is referred to *Barnes v. Viall*, 12 Rep., N. S., 5; *Warne v. Constant*, 4 Johns. 32; *Gross v. Rice*, 71 Me. 241; S. C., 20 Am. L. Reg., N. S., 275; *Ingram v. Butt*, 4 Cranch C. Ct. 701; *Migotti v. Colville*, 40 L. T. 747; *Patterson v. Prior*, 18 Ind. 440.

d. *Liability of Deputies, Attorneys, or Third Persons Assisting Officer Arresting under Warrant.*—Where an execution against the person is issued by a clerk, as of course and ministerially, he is not responsible in damages if the writ is issued contrary to law, unless the facts are within his knowledge: *Barnes v. Viall*, 12 Rep., N. S., 5; but one can not protect himself from the effect of an unlawful arrest by the fact that his superior ordered it: *Swart v. Kimball*, 5 N. W. Rep. 635; thus a deputy arresting by the order of the sheriff where the process is irregular is liable: *Arteaga v. Conner*, 88 N. Y. 403; S. C., 47 N. Y. Super. 494. And an attorney has been held liable for an unwarranted arrest: *Sleight v. Leavenworth*, 5 Duer, 122; although he would be protected if the court had jurisdiction, and the process was regular on its face: *Fischer v. Langhein*, 65 How. Pr. 382; S. C., 62 Id. 238; S. C., 10 Abb. N. C. 128; *Landt v. Hilts*, 19 Barb. 283; see also the note to *Bissell v. Gold*, 19 Am. Dec. 493; and it was said in *Johnson v. Maxon*, 23 Mich. 129, that a charge could not be preferred against an agent who had promoted the proceedings where the process was not wholly void. But an agent can not defend by showing that he acted under instructions from his principal: *Josselyn v. McAllister*, 22 Mich. 300. A stranger who by his advice causes an illegal execution to be issued and an arrest to be made is liable: *Pierson v. Gale*, 8 Vt. 509. It has been held that strangers called upon by a sheriff or constable to assist in arresting a person charged with an offense are not liable: *Kirbie v. State*, 5 Tex. App. 60; *Goodwine v. Stephens*, 63 Ind. 112; *Coyles v. Hurin*, 10 Johns. 285; although it was decided that where the writ ran against the property

and not the body, a stranger detaining the body of the defendant at the request of the constable was subject to an action in *Leach v. Francis*, 41 Vt. 670. To create one not authorized to make an arrest a special constable and justify him in making an arrest, the writ must be directed specially to him by name, and his appointment to act as such must in that particular case be noted by the constable on his docket; and in case of non-compliance with these provisions of the statute, he has no authority to act as special constable, and can not justify under the writ: *Dietrichs v. Schaw*, 43 Ind. 175.

ARRESTS WITHOUT WARRANTS.—a. Arrests by Officers.—This subject is discussed in the note to *Eanes v. State*, 44 Am. Dec. 292. The rule is well settled that a constable, sheriff, or peace-officer has a right to arrest another without a warrant, on a reasonable suspicion that a felony has been committed, or for misdemeanors, breaches of the peace, etc., committed in his view, or to prevent a breach of the peace. See the cases in the note above cited; and in addition to the authorities there collated for support to this proposition, see *Bryan v. Bates*, 15 Ill. 87; *Vandever v. Matlocks*, 3 Ind. 479; *McIntyre v. Raduns*, 9 Rep., N. S., 754; *Minehan v. Thomas*, 9 N. Y. Week. Dig. 32; *Montgomery v. Sutton*, 14 Rep., N. S., 175; S. C., 12 N. W. Rep. 719; *Levy v. Edwards*, 1 Car. & P. 40; *Regina v. Light*, 27 L. J., M. C., 1; *Lawrence v. Hedger*, 3 Taunt. 14; *Taylor v. Strong*, 3 Wend. 384; *Fulton v. Staats*, 41 N. Y. 498; *Burns v. Erban*, 26 How. Pr. 273; *Quinn v. Heisel*, 40 Mich. 576; *Drennan v. People*, 10 Id. 169; *Touhey v. King*, 9 Lea, 422; *In re Powers*, 25 Vt. 261; *Russell v. Shuster*, 8 Watts & S. 308; *McCarthy v. De Armit*, 99 Pa. St. 63; *Scircle v. Neeves*, 47 Ind. 289; *Hutchinson v. Sangster*, 4 G. Greene, 340; *Knot v. Gay*, 1 Root, 66; *Marsh v. Smith*, 49 Ill. 396. But this rule is by no means universal. Officers, though clothed with large discretionary powers, are not omnipotent, and must exercise their discretion in a legal manner; the statute creating their office often limits this discretionary power, and the general rights of individuals form another check to it. And indeed, it has been very often held that such arrests are illegal, and that the officers making them are guilty of false imprisonment: *Paw v. Beckner*, 3 Ind. 475; *Justice v. Gosling*, 21 L. J., C. P., 94; *Williams v. Glenister*, 2 Barn. & Cress. 669; *Hogg v. Ward*, 27 L. J., Exch., 443; *Bowditch v. Balchin*, 5 Exch. 378; *Griffin v. Colman*, 28 L. J., Exch., 134; S. C., 4 H. & N. 265; *Boyleston v. Kerr*, 2 Daly, 220; *Stewack v. Brooks*, 7 Id. 142; *Schneider v. McLane*, 36 Barb. 495; *Phillips v. Fadden*, 125 Mass. 198; *Moore v. Durgin*, 68 Me. 148; *Brock v. Stimson*, 108 Mass. 520; *Kennedy v. Favor*, 14 Gray, 200; *McLennon v. Richardson*, 15 Id. 74; *Prell v. McDonald*, 7 Kan. 426; *Shanley v. Wells*, 71 Ill. 78; *Newton v. Locklin*, 77 Id. 103; *Look v. Dean*, 108 Mass. 116.

b. *Arrest by a Private Person without a Warrant:* See the note to *Eanes v. State*, 44 Am. Dec. 293, discussing this subject.

MISCELLANEOUS INSTANCES OF FALSE IMPRISONMENT.—The congress of the United States has no power to punish for contempt a witness who has been summoned to appear before one of the committees, and who refuses to answer questions propounded to him, if the subject-matter of the investigation is one into which congress had no right to inquire, and the sergeant-at-arms of the house is liable if he arrests the prisoner: *Kilbourn v. Thompson*, 2 Morr. Transc. 56. A commissioner of the circuit court of the United States has no power to fine a party as upon a final trial, and if he does so and imprisons him until the fine be paid, he is guilty of false imprisonment: *Vanderpool v. State*, 34 Ark. 174; so also a commissioner in chancery would be liable for committing a witness who refused to testify: *Marsh v. Williams*, 1 How.

(Miss.) 132; a defendant imprisoned for the non-payment of a fine imposed for violating a municipal ordinance can not be legally compelled to pay the same by manual labor on the street, and if compelled to do so may maintain an action against the officers compelling him: *Torbert v. Lynch*, 67 Ind. 474. But officers of a bank can not justify an imprisonment of a person on the ground that he remained in the bank after the usual time for shutting the same, and was detained by their locking the outer door, though he knew the hour at which the bank was usually closed: *Woodward v. Washburn*, 3 Denio, 369. An express company has power by proper and lawful modes to pursue and cause the arrest and punishment of any one who has stolen or embezzled money or property of the company for which it is responsible, and may employ an agent for such purpose, but for any trespass committed by him in the prosecution of such employment, the company is liable: *American Express Co. v. Patterson*, 73 Ind. 430.

INDICTMENT FOR FALSE IMPRISONMENT.—In an indictment for false imprisonment, the charge that the defendant “was unlawfully and feloniously imprisoned” implies that the act was done without sufficient legal authority, and is good without the latter allegation: *United States v. Lapoint*, 1 Morr. 146; although it was held that if the indictment failed to state that it was “without lawful authority,” it did not allege an offense under the statute or at common law, in *Barber v. State*, 13 Fla. 675; *Waterman v. State*, Id. 683. It should allege the mode in which the detention was effected, but need not further particularize it: *Maner v. State*, 8 Tex. App. 361; but the state is confined to the kind of detention alleged: Id. And the offense must be shown to have been committed in the county named in the indictment: *Barber v. State*, 13 Fla. 675; *Waterman v. State*, Id. 683.

ACTIONS FOR FALSE IMPRISONMENT.—a. *Form of the Action.*—The remedy for the offense of false imprisonment is trespass: *Platt v. Niles*, 1 Edm. Sel. Cas. 230; *Berry v. Hamill*, 12 Serg. & R. 210; *Williams v. Ivey*, 1 Ala. Sel. Cas. 198, 220; *Beebe v. Steel*, 2 Vt. 314; *Allen v. Greenlee*, 2 Dev. L. 370; *Stanton v. Seymour*, 5 McLean, 267; *Price v. Graham*, 3 Jones L. 545; *Castro v. De Uriarte*, 12 Fed. Rep. 250; *Holly v. Carson*, 39 Ala. 345; and not case: *Holly v. Carson*, *Price v. Graham*, *Berry v. Hamill*, and *Platt v. Niles*, all *supra*; but in *Barhydt v. Valk*, 12 Wend. 145; S. C., 27 Am. Dec. 124, it was said that the ordinary remedy was in case; although in a flagrant case of illegal arrest trespass would lie, in *Nebenzahl v. Townsend*, 61 How. Pr. 353.

b. *Pleadings on the Part of Plaintiff or Defendant.*—It is not necessary that the plaintiff should allege or prove malice: *Akin v. Newell*, 32 Ark. 605; nor that the acts complained of were done illegally or wrongfully, or without competent authority: *Gallimore v. Ammerman*, 39 Ind. 323; indeed, it is not necessary to aver that the imprisonment was either wrongful, unlawful, malicious, or without probable cause: *Carey v. Sheets*, 60 Ind. 17; and if the complaint should allege that the imprisonment was “without any reasonable or probable cause whatever,” these words may be rejected as surplusage, and need not be proved: *Johnson v. Von Kettler*, 84 Ill. 315; an allegation that the arrest was caused “at the instigation and procurement” of the defendant is sufficient: *American Express Co. v. Patterson*, 73 Ind. 430; the particular instrumentality by which the plaintiff was deprived of his liberty should not be set out, and if it is, it may be stricken out: *Eddy v. Beach*, 7 Abb. Pr. 17; *Shaw v. Jayne*, 4 How. Pr. 119. In *Nebenzahl v. Townsend*, 61 How. Pr. 353, it was held that actions for false imprisonment and malicious prosecution could not be joined; but in *Castro v. De Uriarte*, 12 Fed. Rep. 250, the

contrary was held. The defendants can not deny knowledge or belief as to the allegation that they caused to be issued the writ on which the plaintiff was arrested, and an answer to a verified complaint making that issue may be stricken out upon motion, without any additional affidavit in support of the motion: *Lawrence v. Derby*, 15 Abb. Pr. 346, note; S. C., 24 How. Pr. 133. A defendant justifying and joining in a plea with a co-defendant who can not justify loses his defense: *Gold v. Bissell*, 1 Wend. 210; S. C., 19 Am. Dec. 480.

c. *Evidence and Miscellaneous Points of Practice.*—Trespass for false imprisonment under a *ca. sa.* can not be supported, as long as the execution on its face remains unsatisfied, or even where there are but costs due: *Wilkins v. Hall*, 2 McCord, 205; the writ must be quashed or in some way vacated: *Blanchard v. Goss*, 2 N. H. 491. If the character of the plaintiff is not put in issue by the pleadings, it is not competent for the plaintiff in his testimony in chief to introduce evidence of his good character: *Cochran v. Toher*, 14 Minn. 385; but if the defendants introduce evidence tending to cast suspicion on the plaintiff's character, evidence of his general good character and of his reputation for honesty and integrity is admissible: *American Express Co. v. Patterson*, 73 Ind. 430. On the trial it is competent to prove, by the justice of the peace who issued the warrant upon which the arrest was made, the fact that a written affidavit was made before him on which he issued the warrant, and when the justice testifies to that fact, it is competent to prove its contents by oral evidence: *Ashley v. Johnson*, 74 Ill. 393; and if a plaintiff include several persons in the suit, and proceeds to issue and trial against some of them, but does not rule the others to plead, the latter may be witnesses for the former, although they were all concerned, as the interest of those not on trial is in the question and not in the case: *Wakely v. Hart*, 6 Binn. 316. In the trial the defendant may prove under the general issue that he was a constable, and arrested and detained the plaintiff by virtue of a legal warrant: *Isaacs v. Camplin*, 1 Bailey, 411; but see *Boas v. Tate*, 43 Ind. 60. As to evidence in mitigation or aggravation of damages, see *post*, "Damages."

d. *Measure of Damages in Actions for False Imprisonment.*—Punitive or exemplary damages may be awarded by the jury in this action: *Sorensen v. Dundes*, 7 N. W. Rep. 259; *Brushaber v. Stegemann*, 22 Mich. 266; *Wiley v. Keokuk*, 6 Kan. 94; *Hall v. O'Malley*, 49 Tex. 70; *Whitmore v. Allen*, 33 Tex. 355. The jury has a right to give damages beyond the mere compensation to the plaintiff for his injuries, and inflict a punishment upon the defendant for his conduct, but not to an arbitrary amount: *Brown v. Chadsey*, 39 Barb. 253; and exemplary damages are only allowable where it appears that the wrong for which the plaintiff sues was done with evident intention and from bad motive: *McCall v. Corning*, 1 Abb. 212. Punitive damages for an illegal arrest should be allowed against a peace-officer only where the arrest was made in bad faith, with some other view than the administration of justice: *Hamlin v. Spaulding*, 27 Wis. 360; and the facts and circumstances of arrest may be shown in mitigation of exemplary damages: *Johnson v. Von Kettler*, 66 Ill. 63; or the circumstances upon which the affidavit was made: *Roth v. Smith*, 41 Ill. 314; and evidence that the defendant acted without malice, or with probable cause, may be admitted in mitigation of exemplary damages: *Comer v. Knowles*, 17 Kan. 436; *Sleight v. Ogle*, 4 E. D. Smith, 445; *Miller v. Grice*, 2 Rich. L. 27; S. C., 44 Am. Dec. 271; *Livingston v. Burroughs*, 33 Mich. 511; *Sugg v. Pool*, 2 Stew. & P. 196; *McCall v. Corning*, 1 Abb. 212; but such evidence is not admissible to diminish the actual

and general damages sustained: *Comer v. Knowles*, 17 Kan. 436. And evidence that the defendants acted under a military order would be admissible to palliate their offense and mitigate damages: *Carpenter v. Parker*, 23 Iowa, 450. Where a plaintiff sues a railroad company for a false detention over night at the instigation of some of its officers, evidence of his discomfort in the place of detention, of illness produced by the dampness of the cell in which he was confined, and of indignities which he suffered at the hands of the police officer are not admissible to enhance the damages: *Murdock v. Boston & A. R. R. Co.*, 133 Mass. 15; but evidence of the loss of a situation is admissible: *American Express Co. v. Patterson*, 73 Ind. 430; and damages not yet accrued may be properly included when they are certain to follow and can be fairly estimated: *Thompson v. Ellsworth*, 39 Mich. 719. Expenses incurred by the plaintiff in the suit in which the arrest was made, and his attorney's fees and other expenses in obtaining his discharge, are not proper elements of damages: *Gibbs v. Randlett*, 58 N. H. 407; *Strange v. Whitehead*, 12 Wend. 64; although the contrary doctrine was held in *Krug v. Waril*, 77 Ill. 603; *Blythe v. Tompkins*, 2 Abb. Pr. 468. Although the jury are the exclusive judges of the amount of damages, they are to be governed by the evidence; and it is error to instruct them that they are exclusive judges of the amount of damages, and might allow any sum they might agree upon, not exceeding the amount claimed in the declaration: *Girdner v. Taylor*, 6 Heisk. 244; but if the damages are greater than should be allowed, the verdict will not be set aside if they are not so flagrantly excessive as to show that they are the result of passion: *Newton v. Locklin*, 77 Ill. 103.

BYERS v. FOWLER.

[12 ARKANSAS, 218.]

RETURN OF SERVICE OF SUMMONS FAILING TO STATE that it was left at the usual place of abode of the defendant, as required by statute, does not render absolutely void a judgment of the circuit court of the United States.

CIRCUIT COURTS OF UNITED STATES ARE ENDOWED WITH SUCH ORIGINAL AND GENERAL JURISDICTION as to entitle them to the benefit of all legal intendments necessary to support and uphold their acts until reversed or annulled by a superior tribunal.

PURCHASER AT EXECUTION SALE IS NOT AFFECTED BY IRREGULARITIES of the sheriff in the sale and his failure to observe all the requisites prescribed by the statute; the requisites prescribed by the statute in respect to the mode of proceeding under an execution are merely directory to the officer, and in no case can the purchaser be the sufferer by an omission to observe them, unless he can be shown to have been cognizant of that fact.

ATTORNEY OF RECORD PURCHASING AT EXECUTION SALE IS NOT BOUND TO TAKE NOTICE of irregularities of the sheriff, and his title is not affected by the existence of irregularities of which he had no notice.

LIEN OF JUDGMENT OF CIRCUIT COURT OF UNITED STATES extends throughout the state, and is not confined to the county in which the court is situated.

LIEN OF JUDGMENT OF CIRCUIT COURT OF UNITED STATES throughout a state does not depend upon the adoption by congress of the state law, but it exists prior to and independent of such adoption.

WHERE MARSHAL WHO SOLD LAND UNDER JUDGMENT OF CIRCUIT COURT OF UNITED STATES IS REMOVED, the court may, upon a proper showing, order his successor to execute and acknowledge the deed, and the act of congress adopting the execution law of this state clearly authorizes its record in the county where the land is situated when so acknowledged.

TRUE TEST OF VOID PROCESS OCCASIONED BY IRREGULARITY is that the irregularity must be in the process itself, or in the mode of issuing it; it can not be irregular when sued out according to the established course of practice.

SALE BY MARSHAL OF LAND LEVIED ON BY PREDECESSOR under a judgment of the circuit court of the United States, after his term of office had expired, but under a writ which had come into his hands during his continuance in office, is irregular, and upon a direct application to the court by any of the parties interested it would be set aside, but such an irregularity at most would only render the sale voidable, and it could not be assailed in a collateral proceeding.

EQUITY OF BONA FIDE PURCHASER FROM FRAUDULENT VENDEE IN EXECUTION SALE is prior to that of one who purchases the same property under a subsequent judgment against the same defendant.

ANSWER SETTING UP DEFENSE OF "BONA FIDE PURCHASER" is DEFECTIVE if it fails to aver a want of notice down to the delivery of the deed.

DEFECT IN ANSWER AS TO MATTERS OF SUBSTANCE IS NOT CURED by filing a general replication to the answer.

WHERE BIDDING AT EXECUTION SALE IS PREVENTED on account of a request made by the execution defendant of those present that they refrain from bidding, and the property is purchased in for the benefit of the defendant, the sale is fraudulent as to creditors, and a purchaser from the vendee with notice occupies no better position than his vendor.

PURCHASERS UNDER JUDGMENT ARE ENTITLED TO ALL RIGHTS OF JUDGMENT CREDITOR against the defendant and those who fraudulently purchased his property at a prior execution sale against him for his benefit.

STRIKING OUT INTERROGATORIES IN BILL FOR DISCOVERY IS NOT ERROR for which a judgment will be reversed, when from the evidence introduced the legal effect is the same as if they had not been stricken out and had been answered.

VALUE OF PERMANENT AND USEFUL IMPROVEMENTS MAY BE SET OFF BY BONA FIDE PURCHASER for value and without notice against the claim of the rightful owner to the extent of the rents and profits.

BONA FIDE PURCHASER WILL NOT BE CHARGED WITH COMPLAINANT'S COSTS when he defends against a suit brought to recover the property purchased, and fails.

FOWLER and Denton filed a bill in chancery against Tully, Fulcher, Byers, and McDonald, alleging substantially that J. R. and P. Neff, partners, obtained a judgment against Tully in the United States circuit court for the district of Arkansas, on April 2, 1841, sued out a *fi. fa.* which was returned no property, and February 4, 1843, sued out an *alias fi. fa.*, under which the marshal seized the land in question and sold it, on the twentieth of March, 1843, to the complainants; that after the

sale, Newton, the marshal, was removed from office, and on application to the court, Rector, his successor, was ordered to make the complainants a deed, and accordingly Rector executed to them a deed of the premises on the twenty-fourth of April, 1844, which he duly acknowledged, and which they recorded on June 25, 1844; that one Grollman had purchased the land under a sale on a judgment in the same court against Tully, on the fourteenth of August, 1841, in open fraud of creditors and in trust for Tully, and with his funds; and that the sale was made by one Frazer, a deputy of Rector, and the deed was afterwards executed by Newton, his successor, without authority of law; that Fulcher and McDonald claim title under Grollman; that Byers claims under an illegal purchase at a sale under an execution against Tully by the sheriff of Jackson county and a deed executed by him in pursuance of the sale. The bill prays for a discovery of the facts concerning the purchase by each of the defendants, and that their title deeds be delivered up, and that they account for the rents and profits, etc. An exhibit annexed to the bill sets out the proceedings in the action of *Neff v. Tully* in the circuit court, and by it it appears that the summons was returned as follows: "Executed the within by delivering a copy thereof to a white member of the family of the defendant over the age of fifteen years, and informing said person of the contents." Tully and Fulcher failed to answer. Byers in his answer alleges fraud on the part of Grollman and Tully in the sale under which Grollman purchased, charges McDonald with notice of it, and claims to be the rightful owner of the land under a judgment rendered May 18, 1841, in favor of Powell against Tully, the land being sold under execution on this judgment on the seventeenth of May, 1842, Byers receiving his deed the next day. Byers subsequently filed a cross-bill against the complainant and all the defendants, in which he alleges his own title, the fraud and irregularity in the sale at which Grollman purchased, notice on the part of McDonald of Grollman's fraud and of the lien of Powell's judgment, and further alleges that the judgment of the Neffs against Tully was void and no lien on the land; that the execution issued on it was not in the proper form, and the whole proceedings were irregular; that the sheriff did not properly advertise the sale, and that the sale was irregular; and that Rector without authority executed a deed to Denton and Fowler for the lands, and it was not properly acknowledged, proved, or admitted to record, and could not be received in evidence; and he prays that his

title be quieted and all the other titles be quieted. The claim of McDonald, as stated in his second amended answer, appears in the fifteenth page of the opinion of the court; his answer to Byers' cross-bill is substantially the same. The evidence established clearly that the sale to Grollman was fraudulent, that Tully had gone amongst the bidders requesting them not to compete, and had made a speech to them asking them to refrain from bidding, and Grollman purchased the property for his benefit. The court decreed that the complainant was entitled to the relief prayed, and ordered that the deeds of Byers and McDonald be canceled, and that they account for the rents and profits; and awarded costs to the complainant. Byers took a bill of exceptions to the rulings of the court in admitting evidence, as follows: 1 In admitting the judgment and proceedings under it the action of the Neffs against Tully; the execution, sale, application for a deed by Rector's successor, the order for the deed, etc.; 2. In admitting a rule of the circuit court prescribing the mode of selling property under execution. The other objections of Byers appear from the opinion of the court.

Byers, Fairchild, Watkins, and Curran, for the appellants.

Fowler, contra.

By Court, JOHNSON, C. J. The objection to the service of the original summons in the case of Neff & Brother instituted in the circuit court of the United States for the district of Arkansas, and under the judgment rendered in which the complainants in the original bill claim title, is well taken in fact, but is untenable in point of law. The service did fail to state that the summons was left at the usual place of abode of the defendant, as required by the statute, and might, possibly, upon a direct proceeding in an appellate court, have been reversed. Such a defect, however, can not operate to render absolutely void the judgment rendered in that case. The circuit courts of the United States are not of that special and limited class to which no presumptions are extended, but on the contrary, they are endowed with such original and general jurisdiction as to entitle them to the benefit of all legal intendments necessary to support and uphold their acts until reversed or annulled by a superior tribunal. See *Borden et al. v. State, Use of Robinson*, 11 Ark. 519 [*ante*, 217].

The next point made relates to the power of the circuit court of the United States to adopt a certain rule, since the act of

congress of 1842. It is contended that, inasmuch as that act adopts the state law prescribing the form and regulating the proceedings under a writ of execution, the federal court had no authority to adopt any rule variant from the one therein prescribed, and that therefore the complainants, having purchased under an execution enforced in obedience to such rule and not in strict conformity with the state law, their purchase is void. We deem it unnecessary to investigate the question thus presented, as in no event could it affect the rights of the parties claiming under the execution. The only result of this position, upon the assumption that it is true, would be that the sheriff had failed to observe all the requisites prescribed by the state law, and that therefore irregularities had intervened in the sale. The court of appeals of Kentucky, in the case of *Hayden v. Dunlap*, reported in 3 Bibb, 219, said: "But were the intention of the legislature still doubtful, the highly inconvenient consequences which would inevitably result from a construction that would vitiate the sale on the grounds now under consideration, ought, we think, to be decisive against its adoption. If the purchaser of lands under execution might, at any time within which a real action may be brought, have his title impeached by proof that the defendant in such execution had personal estate of which the demand could have been made, or that the sheriff had not advertised or given notice to the defendant according to law, it must be obvious to every one that no prudent man would bid for land exposed to sale a sum anything like adequate to its value. Such a construction, as it would render the title insecure, would consequently tend to diminish the price of land sold under execution, and would in so much be prejudicial as well to debtors as to creditors. We must therefore conclude, that in these respects the act is merely directory to the officer. Without doubt it is his duty to comply with its directions, and for a breach of his duty he would be responsible to the injured party; but such a breach of duty is not in itself sufficient to avoid the sale." This is doubtless the true doctrine, and it is well sustained not only by reason, but also by high authority: See *Wheaton v. Sexton*, 4 Wheat. 503; *Cox v. Nelson*, 1 T. B. Mon. 95 [15 Am. Dec. 89]; *Rector v. Hartt*, 8 Mo. 448 [41 Am. Dec. 650]; *Cramer v. Van Alstyne*, 9 Johns. 385; *Beeler's Heirs v. Bullett's Heirs*, 3 A. K. Marsh. 281 [13 Am. Dec. 161]; *Adamson et al. v. Cummins, Adm'r*, 10 Ark. 541.

But it is insisted that as the complainant Fowler was the attorney of record in the original suit and became the purchaser

under the execution, he was bound to take notice of all irregularities. This proposition is too broad to square with the law. The court, in the case already referred to of *Beeler's Heirs v. Bullett's Heirs*, said that "the law directing, first chattels, then slaves, and lastly land to be taken, is directory to the sheriff. If he violates it to the injury of the debtor in an execution, he may be responsible for that injury. But it does not result that the purchaser of lands so taken under execution, even if he be the creditor who has not been instrumental in causing the sheriff thus to violate the law, is to have his title affected, especially after he has tried by other fruitless executions to reach other estate before he touched the land. The defendants seem to mistake the law, so far as to suppose that the plaintiff claiming under a sale by execution is bound to show that all the requisites of the law in making the sale have been complied with, instead of placing the *onus probandi* on the other side, and compelling him who opposes the sale to prove it irregular."

The high court of errors and appeals of the state of Mississippi, in the case of *Doe ex dem. Starke v. Gildart and Morris*, 4 How. (Miss.) 267, also said that "the law is well settled by an unbroken chain of adjudicated cases, that a mere irregularity for which an execution would be voidable merely, does not affect the right of a purchaser under it. This doctrine was recognized by this court in the case of *Snyder v. Vancompen*, decided at the present term. The variance can not be regarded as anything more than an irregularity for which the execution would be voidable, and might be set aside on application of the defendants. There was a good judgment to support it; and it was an authority to do all that the decree had authorized. That it authorized a levy on the individual property of the defendants was evidently a clerical mistake, arising no doubt from a misconception of the decree. On the application of the plaintiff, it might have been amended to conform to the decree: *Bissell v. Kip*, 5 Johns. 100; *Jones v. Cook*, 1 Cow. 313. It is admitted that a sale under a voidable execution does not affect the right of the vendee, if he be a stranger to the judgment and execution, and purchase without notice of the defect; but it is said that the rule can not apply to *Starke*, who was plaintiff in the execution and therefore bound to know of the defects, and in support of this position the case of *Simonds v. Catlin*, 2 Cai. 61, is relied on. In that case it was held that the plaintiff, who was the attorney in the original suit, was properly chargeable

with notice of every irregularity attending the execution, but there is a material distinction between that case and the one at bar. There a motion was made after verdict in ejectment to set it aside: '1. Because a *fiery facias* issuing into a different county than that in which the venue is laid without a testation is void.' The court sustained the motion for this and another reason, for both of which the execution was not voidable merely, but void; and was therefore improper evidence. A party to a void process could acquire no title under it, and this seems to be the reason of the case. Starke's execution was at most only voidable, and did therefore give title to the vendee under it. Even if it could have been set aside on the application of the defendants, they have not thought proper to have this done, and being only voidable, while it is permitted to remain in force, it must have the effect of a regular execution. No person can have a right to question it but the parties, and they must do it directly and not collaterally: *Jones v. Cook*, 1 Cow. 313; *Jackson v. Robins*, 16 Johns. 574. The language of Chancellor Kent, in the last case cited, may with great propriety be applied in the case before us. In regard to an execution which was irregularly issued, he says: 'In the first place, the better opinion is that if execution issued without *scire facias*, the sale under it would not have been void. It might have been voidable and liable to have been set aside by the supreme court, upon motion, as irregular, or by this court, upon error, as erroneous, but until that was done, the title would have stood. This question of irregularity or error never can be discussed collaterally in another suit. It is not a point in issue in this action of ejectment.' The opinion from which this language was extracted was delivered in the court for the correction of errors, and it may be presumed that every point was fully investigated. Let it be supposed, then, that Starke was a purchaser with notice: of what had he notice? Of a mere variance which he could have amended, and which did not vitiate the execution, but at best only furnished a ground for setting it aside by the direct application of those who were interested. It could not be questioned collaterally. The case would have been different if it had been void. That which is void is essentially inoperative from the beginning, and can have no binding quality. We therefore think that the condition of Starke was not materially different from that of a stranger, and the variance between the decree and execution did not justify the ruling of them out."

The principle to be deduced from that case and those cited in

it, when applied in this, is perfectly conclusive in favor of the purchase of the complainants. Admitting all the irregularities alleged to exist, they could not be brought up collaterally to affect a sale made under a valid execution, and more especially by a stranger to the original judgment. This is the settled doctrine upon the subject, and will be found to run through all the authorities. The requisites prescribed by the statute in respect to the mode of proceeding under an execution are merely directory to the officer, and in no case can the purchaser be the sufferer by an omission to observe them, unless he can be shown to have been cognizant of the fact. There is no pretense that the complainants were cognizant of any neglect of the marshal in this particular; and in the absence of such allegation and proof to establish that fact, their purchase can not be affected by it.

The exhibit of a rule, which purported to have been adopted by the federal court, and which was somewhat variant from the one prescribed by the state law, it is presumed, was offered by the complainants to meet the charge of irregularity alleged in the defendant Byer's cross-bill. The complainant in the cross-bill having wholly failed to charge a knowledge of the fraud perpetrated by the officer, if indeed such fraud was committed, no issue could be made in respect to it, and consequently the complainants in the original bill stood exonerated by the law. This being the case, all of their efforts to negative the idea of fraud on the part of the officer were a work of mere supererogation, and whether they succeeded or not, can not affect the question of their title.

The next ground of objection relates to the extent of the lien, created by a judgment rendered in the circuit court of the United States. It is urged that the lien of such judgment does not extend beyond the limits of Pulaski county, in which the court is situated. In the case of *Conrad v. Atlantic Insurance Company*, 1 Pet. 453, the court say: "The judgments in the federal courts within the district of New York, are liens upon real property in like manner as judgments of the state courts, and to the extent of the local jurisdiction of the court. And so in every other state the judgments of the federal courts have the same lien, to the extent of its jurisdiction, as the judgments of the highest court in the state." The case of *Den ex dem. Shrew v. Jones*, 2 McLean, 83, is directly in point. The court in that case said: "If, as contended, the liens of the judgments of this court be limited to the county in which they are rendered,

as in the inferior courts of the state, the judgments of this court have, in effect, no lien. The law of the state which extends the lien of a judgment of the circuit court of the state to any county within which the record of such judgment shall be recorded, can have no application to this court. We have no right under it to require our judgments to be recorded by any clerk of the state court. The law of Indiana regulating judgments and executions, as it stood in 1828, is the law of congress by adoption. Effect must be given to the provisions of this law, so far, at least, as they are adapted to the organization and powers of this court. If the rules of proceeding by the circuit courts of the state be followed by this court, effect is given to them without reference to the limited jurisdiction of these courts. The limits of the state, in the exercise of the jurisdiction of this court, are as the limits of the county to the local court. The modes of judicial proceedings and rules of property are different in the different states, and in adopting those rules, congress designed, as far as practicable, to give the same effect to them in the courts of the Union as in the courts of the state. No other course of legislation could have been so well calculated to produce a harmonious action in the judicial departments of both governments. But if a state law, being framed in reference to the limited jurisdiction of the state courts, for this reason can not constitute a rule for the federal courts, the legislation of congress on the subject has been in vain. Such has not been the view taken by the courts of the United States. The law of the state regulates the proceedings of a sheriff on execution. He is to advertise the property, real and personal, etc., but his duties are all limited to the county. The same rule governs the marshal, and operates throughout the state. The principles of the state law are adopted, but the instruments which give effect to those principles are necessarily different, and they are made to operate throughout a more extended jurisdiction." The case of *Massingill et al. v. Downs*, 7 How. 760, is to the same effect. In that case the court say: "The circuit courts of the United States exercise jurisdiction co-extensive with their respective districts. And it has never been supposed that by the process act of the nineteenth of February, 1828, which adopted the process and modes of proceeding of the state courts, the jurisdiction of the circuit courts was restricted. The 'process and modes of proceeding' in the state were adopted by congress in reference to the jurisdiction of the circuit courts, and not with the view of limiting the jurisdiction of those courts. In those states where the judg-

ment or the execution of a state court creates a lien only within the county in which the judgment is rendered, it has not been doubted that a similar proceeding in the circuit court of the United States would create a lien to the extent of its jurisdiction. This has been the practical construction of the power of the courts of the United States, whether the lien was held to be created by the issuing of process or by express statute. Any other construction would materially affect and in some degree subvert the judicial power of the Union. It would place suitors in the state courts in a much better condition than in the federal courts."

But if it should be supposed that, inasmuch as the laws of this state in regard to judgments and executions, were not adopted by congress until August, 1842, and subject to the rendition of the judgment under which the complainants in the original bill claim title, that therefore the judgment could not create a lien throughout the state, we answer that such a lien does not depend alone upon the adoption of the state law, but that it existed prior to and independent of such adoption. It was said, in reference to this point, by the court in the case already referred to of *Den ex dem. Shrew v. Jones*, 2 McLean, 79, that, "as land was not liable to be sold on executions or extended at common law, it is clear that at common law the judgment created no lien on the land of the defendant. But the argument is not sustainable that a judgment can not operate as a lien on real estate unless this effect be specially given to it by statutory provision. The statute of 2 Westm., 13 Edw. I., gave the *elegit* which subjected real estate to the payment of debts, and this, as a consequence, it has always been held, gave a lien on the lands of the judgment debtor: 3 Salk. 212; *Wynne v. Wynne*, 1 Wils. 39; *Coutts v. Walker*, 2 Leigh, 268; *Coleman v. Cocke*, 6 Rand. 618 [18 Am. Dec. 757]; *United States v. Morrison*, 4 Pet. 124; *Bank of the United States v. Winston*, 2 Brock. 252; 2 Bla. Com. 418; 2 Bac. Abr. 731; *Tayloe v. Thomson*, 5 Pet. 367. The same doctrine was held by the supreme court of this state, in a learned and able opinion in the case of *Ridge v. Prather*, 1 Blackf. 401. The court say: 'We have always had a statute at least as strong as that of Westm. 2, by virtue of which judgments are liens upon real estate.' But until the act of 1818, there was no statute declaring that judgments should be a lien on real estate. In the view of the court such lien arose from the various acts subjecting lands to execution. The thirteenth section of the act of 1818, entitled 'An act to prevent frauds

and perjuries,' gives a lien on the real estate of the defendant from the time of signing the judgment. This statute, it would seem, was introductive of no new principle, but gave effect from a specified time to a judgment lien. It is unnecessary to inquire whether, prior to this time, the lien took effect from the commencement of the term or not: it is enough to know that it existed. The lien under this statute, as well as that which existed before the statute, being general, must have extended throughout the state. The circuit courts had power to issue execution to any county in the state. And as their jurisdiction, thus to enforce their judgments, extended throughout the state, the lien must have been co-extensive with their jurisdiction." We entertain no doubt, therefore, that, in either state of case, the judgment under which the complainants claim operated as a lien upon the real estate of Tully throughout the state.

The next and last objection urged by the defendant Byers to the title of the complainants is, that the marshal's deed, under which they claim, had not been acknowledged or admitted to record according to the requisitions of our statute. The act of congress of May 7, 1800, section 3, provides that, 'whenever a marshal shall sell any lands, tenements, or hereditaments, by virtue of a process from a court of the United States, and shall die or be removed from office, or the term of his commission expire before a deed shall be executed therefor by him to the purchaser, the purchaser or plaintiff at whose suit the sale was made may apply to the court from which the process issued, setting forth the case, and assigning the reason why the title was not perfected by such marshal: and thereupon the court may order the marshal for the time being to perfect the title and execute a deed to the purchaser, he paying the purchase money, and costs remaining unpaid." The complainants alleged in the petition and established all the facts necessary to authorize Rector, the successor of Newton, to execute and acknowledge the deed. They satisfied the court out of which the execution issued, that, after Newton had sold the property, and before he had executed a deed to themselves, who were the purchasers, he was removed from office, and that Rector had been appointed his successor. The court, upon the showing, ordered Rector to execute the deed, which he did, and acknowledged the same before the court. But it is also contended that, although the deed shall have been properly executed and acknowledged, yet it was not a fit subject for record in the office of the clerk of the Jackson circuit court. If any doubt could have existed as to

the propriety and legality of recording the deed before the adoption of our execution law by the act of 1842, there certainly can not now remain the least ground for such a doubt. Our statute, after providing for the execution and acknowledgment of deeds by the sheriff before the circuit court of the county, then declares that any deed so executed shall be recorded as other conveyances of land, and thereafter such deed, or a copy thereof, or of the record certified by the recorder, shall be received in any court in this state without further proof of the execution thereof. The act of congress, by adopting this statute, though necessarily permitting a departure so far as the court before whom the acknowledgment should be made, does most clearly authorize its record in the county where the land is situated when so acknowledged.

We have now carefully examined each objection urged by the defendant Byers against the claim set up by the complainants, and have not found the first one sustained by the principles of the law. We will next proceed to look into those raised to the claim of McDonald.

The first point made in respect to this branch of the case is, that the marshal, who conducted the sale at which Van Grollman purchased, was not clothed with legal authority to make such sale, and that consequently Van Grollman did not derive any title from it. If this position be correct, it will necessarily follow that McDonald, who deduces his title from Van Grollman, will be left without any basis upon which to rest his claim. The act of congress passed in 1800 is relied upon to sustain this position. The third section of that act provides, "that where a marshal shall take in execution any lands, tenements, or hereditaments, and shall die or be removed from office, or the term of commission shall expire before sale, or other final disposition made thereof, the like process shall issue to the succeeding marshal, and the same proceedings shall be had as if such former marshal had not died or been removed, or the term of his commission had not expired." The ground taken is, that as the execution under which the sale was made was levied by Rector, and that, after his removal from office, the sale was conducted by Newton, his successor, it was void for want of authority, and that consequently no title passed to Van Grollman, the purchaser. It is contended on the part of McDonald that the ground assumed is not true in point of fact, but that on the contrary, there is an utter failure by the record to show that any levy had been made by the predecessor of the marshal who

made the sale, or that in case it shall appear that such levy was made by him, it is then insisted that it was so made after his removal, and that as such it is a mere nullity. It is clear that, in case that the execution in question shall fall within the operation of the act of 1800, and the levy shall have been made by marshal Rector, or by his deputy, after his removal from office, that such levy was irregular, and could have been taken advantage of by the parties interested upon a direct application to the court for that purpose. Upon this point we are not without authority.

In the case of *Overton v. Gorham*, 2 McLean, 510, the court say: "The third section of the act of the seventh of May, 1800, provides 'that where a marshal shall take in execution any lands, tenements, or hereditaments, and shall die or be removed from office, or the term of his commission shall expire before or after sale, or other final disposition made thereof, the like process shall issue to the succeeding marshal, and the same proceedings shall be had as if such former marshal had not died or been removed, or the term of his commission had not expired.' From this provision it is clear that the sale in this case was irregular. After his removal from office the marshal, under the act of 1789, has power to execute all such precepts as may be in his hands; but the act of 1800 provides that his successor shall sell the lands on which he has levied but not sold before his removal. Notice to the late marshal of his removal was not necessary. His functions were terminated by the act of his removal."

It appears, by reference to the testimony in the cause, that Newton was appointed on the twentieth of April, 1841, and that the levy was made by Frazer, the deputy of Rector, on the eighth of May of the same year. The question now to be determined is, whether an execution thus circumstanced is in full life, and clothes Newton with such authority as to enable him to pass title to the purchaser under his sale. The true test of a void process occasioned by an irregularity is believed to be found in the rule laid down by Gould, J., in the case of *Luddington v. Peck*, 2 Conn. 702. He said: "The irregularity must be in the process itself or in the mode of issuing it: it can not be irregular when sued out according to the established course of practice." If the state of facts existing at the time the process issued be such as to render it unlawful, that is sufficient. We are not to understand, by appearing irregular on the face of the process, that the irregularity is stated in the writ. It fre-

quently appears by reference to extrinsic circumstances. Thus a writ tested and returnable out of term is irregular. When and where the terms are held by law, and how long the court was in session. is not stated in the writ, a knowledge of this is derived from other sources, and yet it may truly be said the writ is bad on the face of it. See *Woodcock v. Bennet*, 1 Cow. 740 [13 Am. Dec. 568].

We will now proceed to apply this test to the execution in question. It is not pretended that any obstacle existed in the way of its issuance at the time it first went forth; nor is it claimed that it bears any irregularity upon its face; but, on the contrary, it is conceded that it issued by authority and that it is fair and regular upon its face. But it is insisted that under the operation of the acts of congress it ceased to exist for all legal purposes, *eo instanti*, upon the removal of marshal Rector, in whose time it was issued, and that consequently any action under it by Newton, his successor, was irregular and void. We do not so understand the operation of the acts referred to. The levy not having been made until after the removal of Rector, it is clear that the case can not come within the operation of the act of 1800, and must of necessity fall within that of 1789. The latter act provides, that "every marshal or his deputy, when removed from office, or when the term for which the marshal is appointed shall expire, shall have power, notwithstanding, to execute all such precepts as may be in their hands respectively at the time of such removal or expiration of office, and the marshal shall be amenable," etc. If this be the correct construction, it follows that the levy by Rector's deputy was strictly legal and regular, and that nothing more remains to be decided but the propriety and legality of the sale by his successor. Here we are met by the argument that as Rector possessed the power under the law to complete the execution of the writ, that therefore Newton, his successor, could not legally do the same thing. We are free to admit that the sale made by Newton, under the circumstances, was irregular, and that upon a direct application to the court, by any of the parties interested, it would have been set aside; but it is by no means clear that the objection can be entertained in a collateral proceeding. The objection urged against the sale under which McDonald claims title is not founded upon any defect in the execution itself; but, on the contrary, it is leveled solely at the individual who assumed to exercise the functions of an officer on that occasion.

From the view which we have taken of the law as applicable to the execution in question, we are satisfied that the removal of Rector did not make the slightest impression upon it, but that it still retained all its vitality until exhausted by its full and final consummation. It is shown by the testimony that Newton was the marshal of the district at the time of the sale, regularly commissioned and qualified, and that, to say the least of it, if not *de jure*, he certainly stood in the attitude of marshal *de facto* to the writ under which he acted in making the sale. We conceive that every reason that could possibly obtain in favor of upholding sales, where mere irregularities not affecting the validity of the process itself had intervened, will apply with all their force to one situated like the one before us. The individual who conducted the sale was not only reported in the country as the marshal, but he was in truth and in fact the lawful officer duly commissioned and qualified to act as such. If the public under such a state of case should not receive the protection of the courts in their purchases, it would necessarily destroy all confidence in such sales, and tend to the great and manifest injury of all parties concerned. We are therefore clear that the execution having issued by lawful authority, and there being no legal impediment to its full and final consummation, the most that the irregularity alleged could amount to would be to render the sale voidable, and not absolutely void, and consequently not liable to be assailed in a collateral proceeding.

It is conceived unnecessary to notice the objection to McDonald's title founded upon a supposed defect in the lien of the judgment under which Van Grollman purchased, on the failure of the marshal to advertise or sell at the time and place prescribed by the state law, as all the ground in reference to those irregularities has been explored whilst answering similar objections to the title of the complainants in the original bill.

The next point taken by the complainants is that Van Grollman's purchase being fraudulent as against the creditors of Tully, and McDonald being cognizant of such fraud before he consummated his purchase, their equity is paramount, and consequently must prevail. We consider that it would be a waste of time and unnecessary labor to comment in detail upon all the evidence tending to fix fraud upon Van Grollman in the purchase at the marshal's sale, as the current runs so strong in that direction as to leave no ground for a rational doubt upon that subject. The testimony is perfectly conclusive that Van Grollman purchased the property for Tully's use and benefit,

and such being the state of fact, it is equally clear that in case McDonald was cognizant of the fraud before he consummated his purchase, that his claim must yield to that of the complainants. But if, on the contrary, he was a *bona fide* purchaser for a valuable consideration, without notice, the judgment under which his vendor purchased being the oldest, his equity is necessarily prior to that of the complainant's and must prevail against it.

But we are here met by the position that the answer of McDonald is insufficient in point of law, even admitting the sufficiency of his proof to entitle him to the benefit of the defense set up by him, and the case of *Boone v. Chiles*, 10 Pet. 210, amongst others, is relied upon. We will now proceed to look into this matter, and to see how the case actually stands. In the case of *Boone v. Chiles*, Id. 210, 211, the court say: "It is a general principle in courts of equity that where both parties claim by an equitable title, the one who is prior in time is deemed the better in right: *Fitzsimmons v. Ogden*, 7 Cranch, 18; *Anderson v. Roberts*, 18 Johns. 532; *Bayley v. Greenleaf*, 7 Wheat. 46; and that where the equities are equal in point of merit the law prevails. This leads to the reason for protecting an innocent purchaser holding the legal title against one who has the prior equity: a court of equity can act only on the conscience of a party: if he has done nothing that taints it, no demand can attach upon it, so as to give any jurisdiction: Sugd. on Vend. 722. Strong as a plaintiff's equity may be, it can in no case be stronger than that of purchaser, who has put himself in peril by purchasing a title and paying a valuable consideration without notice of any defect in it or adverse claim to it: and when, in addition, he shows a legal title from one seised and possessed of the property purchased, he has a right to demand protection and relief: *Wallwyn v. Lee*, 9 Ves. 30-34; which a court of equity imparts liberally. Such suitors are its most especial favorites. It will not inquire how he may have obtained a statute, mortgage, incumbrance, or even a satisfied term, by which he can defend himself at law, if outstanding; equity will not aid his adversary in taking from him the *tabula in naufragio*, if acquired before a decree: *Radnor v. Vendebendy*, Shower's P. C. 69; *Symmes v. Symonds*, 4 Bro. P. C. 328; *Willoughby v. Willoughby*, 1 T. R. 767; *Radnor v. Rotheram*, Pr. Ch. 65; *Maundrell v. Maundrell*, 7 Ves. 576; S. C., 10 Id. 268, 270; *Knott, Ex parte*, 11 Id. 619; *Brown v. Williams*, 2 Ch. Cas. 135; *Anonymous*, Id. 136; 2 Vin. Abr. 161; *Jones v. Manchester*, 1 Vent. 198. Relief

will not be granted against him in favor of the widow or orphan: *Dudley v. Dudley*, Pr. Ch. 249; *Jerrard v. Saunders*, 2 Ves. jun. 457, 458; *Belchier v. Kenforth*, 5 Bro. P. C. 292; nor shall the heir see the title papers: 18 Vin. Abr. 115; *Sherly v. Fagg*, 1 Ch. Cas. 69; *Anonymous*, 2 Id. 4; *Burlace v. Cooke*, 2 Freem. 24; *Millard's Case*, Id. 43; *Churchill v. Grove*, Id. 175; it is a bar to a bill to perpetuate testimony or for discovery: 1 Harr. Ch. Pr. 261-263; Sugd. on Vend. 723, 724; *Bechinall v. Arnold*, 1 Vern. 354; and goes to the jurisdiction of the court over him: his conscience being clear, any adversary must be left to his remedy at law: *Jerrard v. Saunders*, 2 Ves. jun. 457; *Cranstown v. Johnston*, 3 Id. 183, 170; *Wallwyn v. Lee*, 9 Id. 30; *Anderson v. Roberts*, 18 Johns. 532 [9 Am. Dec. 235]; *Fitzsimmons v. Ogden*, 7 Cranch, 18. But this will not be done on mere averment or allegation; the protection to such *bona fide* purchase is necessary only when the plaintiff has a prior equity, which can be barred or avoided only by the union of the legal title with an equity, arising from the payment of the money and receiving the conveyance without notice, and a clear conscience. It is setting up matter not in the bill; a new case is presented, not responsive to the bill, but one founded on a right and title, operating, if made out, to bar and avoid the plaintiff's equity, which must otherwise prevail: *Wallwyn v. Lee*, 9 Ves. 33, 34. The answer setting it up is no evidence against the plaintiff, who is not bound to contradict or rebut it: *Simson v. Hart*, 14 Johns. 63, 74; *Paynes v. Coles*, 1 Munf. 396, 397; *Clason v. Morris*, 10 Johns. 544-548; *Leeds v. Mar. Ins. Co.*, 2 Wheat. 383; *Lenox v. Prout*, 3 Id. 527; *Hughes v. Blake*, 6 Id. 464; *Smith v. Brush*, 1 Johns. Ch. 461. It must be established affirmatively by the defendant independently of his oath: *James v. McKernon*, 6 Johns. 559; *Green v. Hart*, 1 Id. 590; *Skinner v. White*, 17 Id. 367; *Anderson v. Roberts*, 18 Id. 532 [9 Am. Dec. 235]; *Hart v. Ten Eyck*, 2 Johns. Ch. 87, 90; *Blount v. Burrow*, 4 Bro. C. C. 75; *Kirkpatrick v. Thrupp*, 2 Amb. 589; 4 Ves. 404 [miscited]; Id. 589 [miscited]; 3 Johns. Ch. 583 [miscited]. In setting it up by plea or answer, it must state the deed of purchase, the date, parties and contents, that the vendor was seised in fee and in possession; the consideration must be stated with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed. Notice must be denied previous to and down to the time of paying the money and the delivery of the deed; and if notice is especially charged, the denial must be of all the circumstances referred to from which notice can be inferred: and the answer or plea show

how the grantee acquired title: Sugd. on Vend. 766-770; *Wigg v. Wigg*, 1 Atk. 384; *Head v. Egerton*, 3 P. Wms. 280, 281; *Jones v. Thomas*, Id. 243; *Tburville v. Naish*, Id. 307; *Hughes v. Garth*, 2 Amb. 421; *Story v. Windsor*, 2 Atk. 630; *Wormley v. Wormley*, 8 Wheat. 449; *Potter v. Gardner*, 12 Id. 502; S. C., 5 Pet. 718; *Jewett v. Palmer*, 7 Johns. Ch. 67. The title purchased must be apparently perfect, good at law, a vested estate in fee simple: *Wilson v. Mason*, 1 Cranch, 100; *Lambert v. Paine*, 3 Id. 133-135; *Hurst v. McNeil*, 1 Wash. 75. It must be by a regular conveyance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity: *Shirras v. Caig*, 7 Cranch, 48; *Vattier v. Hinde*, 7 Pet. 271; Sugd. on Vend. 722. Such is a case which must be stated to give a defendant the benefit of an answer or plea of an innocent purchaser without notice: the case stated must be made out, evidence will not be permitted to be given of any other matter not set out: *Vattier v. Hinde*, 7 Pet. 271."

We will now proceed to test the answer of McDonald by the rules thus laid down. He admits in his second amended answer that he was in possession of a portion of the lands described in the original bill, but avers that he obtained possession and derived his title to the same from one Herman Van Grollman, that he purchased the same from said Grollman for a valuable consideration, that is to say, for the sum of sixteen hundred dollars, which was the full value and a high price for said lands, and that he had purchased and fully paid for said lands without any notice of any prior lien or incumbrance upon the lands, and without any notice or suspicion that the title of Grollman was tainted or in any way affected with fraud. He further states that at the time of the marshal's sale, under which Grollman purchased the property in dispute, he was not a resident of Jackson county, and that he did not become a resident till some time after; that during his negotiation for said lands and purchase of the same, he heard nothing, nor did he hear anything calculated to throw doubt or suspicion upon the title of Van Grollman, and that he believed he was getting a full, complete, and perfect title, and that his purchase of the said lands is evidenced by a deed of conveyance from said Van Grollman to him, which is already on file in this case and marked as "Exhibit C," in his answer to William Byer's cross-bill herein, and which he prays may be taken as a part of this answer. He further states that, supposing his title to said lands to be valid and

unquestionable, he has made valuable and permanent improvements thereon by erecting a dwelling-house and outhouses, clearing and fencing, etc., and that said improvements are worth at least one thousand dollars. He then sets out the proceedings under which Van Grollman purchased the lands, and then concludes this branch of his answer by exhibiting a copy of the marshal's deed to him. The profert of the deed from Van Grollman to McDonald, contained in the answer of the latter to Byer's cross-bill, and to which reference is made in his second amended answer to the original bill, is as follows, to wit: "And this respondent says that the sale made by Grollman to himself is witnessed by a deed from said Grollman to him for conveyance of said lands, which deed is herewith filed and marked 'Exhibit C,' and prayed to be taken as a part of this answer." This answer is clearly defective in failing to aver want of notice down to the delivery of the deed from Van Grollman to himself.

But it is insisted that it is now too late to raise the objection, since there is a general replication filed to the answer. This position might be correct as to matters of mere form, but it can not be admitted where matters of substance are involved. A party is not allowed to state one case in a bill or answer and make out a different one by proof; the *allegata* and *probata* must agree: *East India Co v. Keighly*, 4 Mad. 21-29; *Lenox v. Prout*, 8 Wheat. 527; *Hughes v. Blake*, 6 Id. 468; *Leeds v. Mar. Ins. Co.*, 2 Id. 380; *English v. Foxall*, 2 Pet. 612; *Harding v. Handy*, 11 Wheat. 103; *James v. McKernon*, 6 Johns. 559, 563; *Vattier v. Hinde*, 7 Pet. 274; and also the case of *Boone v. Chiles*, already referred to [*ante*, p. 286]. The reason is obvious why such an averment is absolutely necessary in order that the party may fill the character of an innocent purchaser for a valuable consideration without notice. For if he had not obtained the deed, so as to become invested with the legal title, though he may have paid the last cent of the purchase money, his title was merely equitable, and as such would be subject to all the equities upon it in the hands of the vendor, and he would have no better standing in a court of equity: *Shirras v. Caig*, 7 Cranch, 48; *Vattier v. Hinde*, 7 Pet. 271; Sugd. on Vend. 722.

The answer falls far short of the legal standard in several other particulars. It simply avers that his claim is founded upon a deed, but wholly fails to state its date or contents; nor is it stated that the vendor was seised in fee and in possession. These defects may or may not have been cured by the replication; and upon this point we express no opinion; yet it is certain

that, to say the least, it would be much safer to adhere strictly to the rule laid down in framing an answer. We are satisfied, however, that by the failure of McDonald to aver want of notice of the fraud charged in the bill against his vendor down to the time of the delivery of his deed, his defense is incomplete, and that as such he must fail of success, and that without regard to the sufficiency of his proof. From this view of the case, it is clear that McDonald can occupy no better nor higher ground than Van Grollman, his vendor, and as a necessary consequence, if the complainants could have succeeded over the latter, they must be permitted to prevail in a contest with the former.

It appears from the testimony on file in the cause that the instrument upon which the judgment of Neff & Brother was founded, and under which the complainants in the original bill set up their title, was executed in March, 1839, and payable six months after date, and that the sale to Van Grollman took place in 1841. From this it is clear that Neff & Brother, who were creditors of Tully at the time of the sale to Van Grollman, and if such sale was made in fraud of their rights, it is equally clear that as to them it was void. The testimony bearing upon this point is voluminous, and would require much time to comment upon the whole of it; yet we would forego all such considerations in case it presented any conflict, but we are saved the necessity by the fact that the whole current runs the same way, and is so strong as to leave no ground for a rational doubt. The fraud charged upon Tully and Grollman may therefore be considered as a fixed fact, and therefore if the effects of such fraud are to be extended to McDonald, it is clear that he can not be sustained in his pretensions.

The case of *Stovall v. The Farmers' & Merchants' Bank of Memphis*, 8 Smed. & M. 305 [47 Am. Dec. 85], is strongly in point, to show that the sale to Van Grollman was fraudulent as to the creditors of Tully. The proof in that case was that means were resorted to which were calculated to prevent a fair competition in the sale, and that the party who actually purchased the property was heard to say that he had done so for the benefit of the defendant in the execution. This, with the further evidence of continued possession, constituted the substance of the testimony in that case, upon which the court below found against the purchaser at the sale, and the appellate court affirmed the judgment. The suit in that case was prosecuted by the creditors themselves, and in that respect there is a difference between the two cases, and the question which results

is, whether parties claiming under a judgment of such creditor can claim the benefit of his position. This point was expressly ruled in the case of *Hildreth v. Sands*, 2 Johns. Ch. 35, which is quoted with approbation in the case of *White v. Williams*, 1 Paige, 508. It is there said: "There is no doubt the complainant is in a situation to take advantage of the statute remedy. He is a *bona fide* assignee of the judgment, and had an equitable interest in it for his own protection, as indorser of the note, even before that assignment. As a purchaser of the premises, under the judgment, he is also entitled to all the rights which the judgment creditor could have." There can be no doubt, from the view which we have taken of the whole case, that the property claimed by McDonald is liable in his hands to the judgment of Neff & Brother, and the purchasers at marshal's sale under such judgment, being entitled to all their rights, it is equally clear that the complainants in the original bill acquired by such purchase a complete title as against McDonald. This conclusion reached, it necessarily results that the claims of both Byers and McDonald must yield to that of Fowler and the representatives of Denton, and that the decree of the court below is correct so far as it is confined to the question of title.

It is urged that the decree is erroneous for the fact that the chancellor sustained the motion of Byers, to strike out the interrogatories contained in McDonald's second amended answer. This answer charged a corrupt agreement between the defendants, Tully and Van Grollman, and Denton, one of the complainants in the original bill, the purport of which was that Denton had bribed Tully and Van Grollman to leave the country, and decline answering the bill, so that the fraud charged against them might stand confessed, and thereby injure the claim of McDonald. We do not deem it material to inquire whether the matter called for would be admissible in evidence or not, so as to aid the defense set up by McDonald, as it is clear from the testimony in the record, that an answer by both Tully and Grollman, positively denying every allegation in relation to fraud in the marshal's sale, would have been fully and effectually disproved and overturned. The legal effect would have been the same, and consequently there is no ground of complaint in that particular.

The next, and as we conceive the only remaining, question important and necessary to be determined relates to the proper disposition of the rents and profits and the improvements made

upon the land, and also to the costs of suit. It is shown by the testimony that McDonald purchased on the seventh of January, 1842, and that the decree was taken against him on the fifteenth of June, 1848, embracing a period of more than seven years; that at the time he entered upon the lands there were from fifty to sixty acres in cultivation, and that it was worth from one to two dollars per acre per annum, and it also appears that the improvements which he had put upon the land wereworth from one thousand to one thousand two hundred dollars. This bill was filed on the fifth of April, A. D. 1845, and more than three years after McDonald's purchase. If it is allowable under the circumstances of this case to give to the party in possession compensation for his improvements, we most assuredly shall be inclined from our views of the testimony to do so, at least to the extent of the rents and profits claimed for the use and occupation of the land. The testimony tending to bring home a knowledge of the fraud to McDonald in the purchase of Van Grollman is of the feeblest and most unsatisfactory character, and however obligatory we might have considered it upon the merits, from the fact of the finding of the court below, we can not regard it as by any means conclusive when applied to the question of damages. It is clearly the right of an innocent purchaser for a valuable consideration without notice to have the value of permanent and useful improvements set off against the claim of the rightful owner to the extent of the rents and profits. This doctrine is distinctly laid down by the supreme court of New York in the case of *Jackson v. Loomis*, 4 Cow. 172 [15 Am. Dec. 347]. That was an action of trespass for mesne profits. The court in that case say: "There is certainly no reason, in general, why the owner of lands should be compelled to pay for improvements which he neither directed nor desired, as a condition on which he is to gain possession of his property. But where an occupant has taken possession under a *bona fide* purchase and made permanent improvements, it is very hard for him to lose both land and improvements. If the plaintiff is not content with acquiring possession of his property in an improved condition after he has neglected to assert his title for a number of years, it is certainly equitable that the defendant should be allowed the value of his improvements made in good faith to the extent of the rents and profits claimed. This view of the subject is fully supported by *Green v. Biddle*, 8 Wheat. 81, 82, and the authorities there cited, especially *Coulter's Case*, 5 Co. 80. Most clearly the defendant should not

be compelled to pay an enhanced rent in consequence of his own improvements."

The supreme court of the United States, in the case of *Green v. Biddle, supra*, when commenting upon the Kentucky statutes concerning occupying claimants of land, and declaring the common-law rule in relation to damages recoverable by the rightful owner, say: "It is laid down, we admit, in *Coulter's Case*, 5 Co. 30, that the disseisor, upon a recovery against him, may recoup the damages to the value of all that he has expended in amending the houses. See also Bro. Abr., tit. Damages, pl. 82, who cites 24 Edw. III., c. 50. If any common-law decision has ever gone beyond the principle here laid down, we have not been fortunate enough to meet with it. The doctrine of *Coulter's Case* is not dissimilar in principle from that which Lord Kains considers to be the law of nature. His words are: 'It is a maxim suggested by nature that reparations and meliorations bestowed upon a house, or on land, ought to be defrayed out of the rents. By this maxim we sustain no claim against the proprietor for meliorations, if the expense exceed not the rents derived by the *bona fide* possessor.' He cites Papinian, 148, *de rei vindicatione*. Taking it for granted that the rule as laid down in *Coulter's Case* would be recognized as good law by the courts of Virginia, let us see in what respect it differs from the act of Kentucky. That rule is, that meliorations for the property (which necessarily mean valuable and lasting improvements), made at the expense of the occupant of the land, shall be set off against the legal claim of the proprietor for profits which have accrued to the occupant during his possession."

It is clear that the testimony in this case, under the rule thus laid down, will not warrant the decree in respect to damages. The improvements made by McDonald consisted of dwelling-houses, kitchen, negro-cabins, corn-cribs, stakes, clearing land, digging well, etc. James Robinson testifies that the improvements made in 1842, 1843, and 1844 were worth six hundred dollars, and that those made in 1845, 1846, and 1847 were worth three hundred dollars. It was also testified by others that all the improvements were worth from one thousand to one thousand two hundred dollars. The improvements specified were doubtless of a permanent and beneficial nature, and the defendant McDonald having entered in good faith, so far as the testimony shows, he is clearly entitled to have a deduction in consideration of his improvements made before suit brought, to the extent of the rents and profits claimed. McDonald purchased

on the seventh of January, A. D. 1842, and according to the evidence, as found by the chancellor, the rents and profits did not exceed the sum of seventy-five dollars per annum. The improvements made anterior to the fifth of April, 1845, the commencement of this suit, were proved to have been worth six hundred dollars, and the rents and profits down to that time at the same rate could not have exceeded two hundred and forty-three dollars and seventy-five cents, which of course would leave the sum of three hundred and fifty-six dollars and twenty-five cents, to be set off against such rents and profits as shall have accrued since that period. This suit having been commenced on the fifth of April, A. D. 1845, and a final decree having been rendered on the fifteenth of June, A. D. 1848, embracing about three years and two months, the rents and profits during that time could not have exceeded two hundred and thirty-seven dollars and fifty cents according to the rate fixed, which would be minus the value of the improvements made before suit brought just one hundred and nineteen dollars and seventy-five cents. This latter sum he can not claim, as the time of the institution of the suit which operates as notice of an adverse claim to the land is his limit of recovery by way of compensation, and that recovery is strictly confined to improvements made in good faith before the institution of the suit. It was said by Kent, J., who delivered the opinion of the court in the case of *Murray v. Gouverneur*, 2 Johns. Cas. 441, 442 [1 Am. Dec. 177], in error, that as to the sum expended, it may be left for liquidation in an action for the mesne profits, if the respondents should think proper to sue for mesne profits. The action for mesne profits is a liberal and equitable one, and will allow of every kind of equitable defense. It was also held in Pennsylvania, *Hylton v. Brown*, 1 Wash. 298, April, 1818; Whart. Dig., Ejectment, pl. 1, p. 188, U. S. Rep., that "the value of improvements made by the defendant may be set off against a claim of mesne profits, but profits before the demise laid should be first deducted from the value of the improvements." We entertain no doubt but that the defendant McDonald was entitled to compensation for improvements made before suit brought, and in case they are equal in value to the rents and profits claimed, to set them off to the entire extinguishment of such rents and profits. This having been already ascertained, it necessarily follows that he ought to be discharged, and released from that part of the decree which awards damages against him.

The last point to be considered relates to the proper disposition of the costs. From the testimony contained in the record, we think that there can be but little pretense that McDonald was cognizant of the fraud with which the title of his vendor was tainted at the time he made his purchase. It is in proof that he did not reside in the county of Jackson at the time of the marshal's sale to Van Grollman, and that he did not settle in that county till some time thereafter, and there is certainly no evidence of a reliable character going to establish a knowledge of such fraud after he went into Jackson, and before his purchase. We feel satisfied from the fact of his absence at the time of the marshal's sale, the dearth of the evidence to bring a knowledge of the fraud home to him after he went into Jackson county, and from the price which he paid for the property, as well as the secret character of the defect in his title, that his purchase and entry were in good faith. This being the case, though he failed upon the merits, and perhaps more from a defect in his answer than the insufficiency of his proof, we can not believe that it would be consonant with the principles of equity and conscience to visit upon him more costs than he may have incurred in defending this suit. We are therefore of opinion that the whole of the decree rendered in this cause, except so much as awards damages and costs against McDonald, ought to stand; but that so much as gives damages and costs against him ought to be reversed, and that the same as to costs be so entered as only to allow such costs as he may have himself incurred in his defense of this suit in the court below and also in this court; and also that the complainants in the original bill pay all their costs in both courts.

It is therefore ordered, adjudged, and decreed, that the decree rendered by the chancellor in the court below, except so far as it relates to the damages and costs adjudged against the said McDonald, be and the same is hereby affirmed, and that said decree as to the said damages and costs be and the same is hereby reversed and held for naught, and that the said McDonald be discharged and released from the same, and further, that so much as relates to costs as against him be reversed and held for naught, and the said McDonald pay all such costs as he may have incurred in his defense against the said original bill in this court as well as in the court below, and that the complainants pay all such costs as they may have incurred in the prosecution of said original bill against the said McDonald in both courts.

A petition for reconsideration was filed by McDonald, and overruled.

SERVICE OF WRIT OF SUMMONS INSUFFICIENT, WHEN: See *Vaughn v. Brown*, 47 Am. Dec. 730.

CIRCUIT COURTS OF UNITED STATES, JURISDICTION OF: See *Voss v. Martin*, 50 Am. Dec. 750.

LIENS OF JUDGMENTS OF CIRCUIT COURTS: See *Seller's Lessee v. Corwin*, 24 Am. Dec. 301, and note discussing this subject.

PURCHASER AT EXECUTION SALE IS NOT AFFECTED BY WHAT IRREGULARITIES: See *Ingram v. Belk*, 47 Am. Dec. 591; *Howard v. North*, 51 Id. 769.

BONA FIDE PURCHASER FROM FRAUDULENT GRANTEE, RIGHTS OF: See *Choteau v. Jones*, 50 Am. Dec. 460; *Herndon v. Kimball*, Id. 406; *Barnes v. Meeds*, 49 Id. 390.

CORONER MAY, IN CASE OF VACANCY IN OFFICE OF SHERIFF, COMPLETE EXECUTION of process directed to and partly executed before the vacancy occurred: *Greenup v. Stokes*, 52 Am. Dec. 474.

NOTICE MUST BE DENIED FULLY AND POSITIVELY where defense of bona fide purchaser without notice is relied on, and if facts be charged from which such notice may be inferred, such facts must be also denied: *Johnson v. Toulmin*, 52 Am. Dec. 212.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

FISHER v. SALMON.

[1 CALIFORNIA, 413.]

DEED EXECUTED BY AGENT IN HIS OWN NAME is a nullity as to the principal, and the most that could be made of it would be a mere contract to procure a conveyance, but as such it is not binding in law upon the principal.

POWER OF ATTORNEY TO SETTLE UP MERCANTILE BUSINESS, which had been conducted in the name of the principal, does not confer power to purchase, or to execute a note for the purchase price of real estate.

CONSIDERATION OF NOTE AND GUARANTY.—Guaranty of note and the note itself given for the purchase price of real estate, to an agent of the owner who had no authority to convey, are void for want of consideration.

CONSIDERATION OF NOTE OR GUARANTY MAY BE INQUIRED INTO between the original parties.

ACTION upon a guaranty. The opinion states the facts.

Nathaniel Holland, for the plaintiff.

John Chetwood, for the defendant.

By Court, **HASTINGS, C. J.** This was an action on a guaranty of the appellant Salmon of the note of Katherine Salmon, drawn in favor of respondent for the sum of twenty-four thousand dollars, dated November 2, A. D. 1849, and payable, one half in six months, and the balance in twelve months. Both the note and guaranty are between the original parties. The evidence discloses that the respondent was the attorney in fact of the non-resident heirs of one James Scott, deceased, and that the appellant was the attorney of Katherine Salmon, a resident of France, acting under a power of attorney, authorizing her

attorney to settle certain mercantile business, and not giving him authority to make investments in real estate, or to do anything other than to wind up and adjust the affairs of a mercantile house in the city of New York, which had been conducted in the name of Katherine Salmon. The consideration of the note was a deed of conveyance of certain lots in the city of San Francisco, executed by the respondent in his own name, representing that he was the attorney and agent of certain heirs, and was executed under his hand and seal, and not in the name of the principals. It is not necessary to cite authorities to show that such a deed is a nullity as to the principals of the agent Fisher, and the most that could be made of it would be a mere contract on his part to procure a conveyance, but even as a contract it is not binding in law upon the principals.

It is equally clear that, as to Katherine Salmon, the note is also a nullity, her agent having no authority to execute such a note, so that, as between the principals respectively represented by the parties to this suit, the whole transaction was and is void. The contract, then, not being of any validity as against the heirs of Scott, nor as to Katherine Salmon, it results that the question of the liability of the agents of these parties, is to be investigated. Fisher was not the owner of the lots, did not bind the owners to convey, and could not convey in his own name, but Salmon guaranteed the payment of the note. The consideration of this guaranty was in substance the conveyance of the lots, which being invalid and void it follows that there was not a good and sufficient consideration. But it appears that even the heirs have no title. They claim under deeds executed by an American alcalde in 1847, when the United States were at war with Mexico. Such grants have been holden to be nullities by this court. See *Woodworth v. Fulton et al.*, 1 Cal. 295. The heirs were not in possession, and at the time of the contract of sale to Katherine Salmon, the property was unimproved and in a wild and uncultivated state. There was then no valid consideration for the guaranty, and it is unnecessary to summon the authorities cited on the argument in support of the principle, that under the circumstances of this case, the consideration may be inquired into, and that the note and guaranty, for reasons above stated, are void.

The judgment is therefore reversed.

DEED OF ATTORNEY MUST BE EXECUTED IN NAME OF PRINCIPAL, and as his act and deed: *Brinley v. Mann*, 48 Am. Dec. 669; *Hale v. Wood*, 34 Id. 176, and note.

AUTHORITY TO MAKE PROMISSORY NOTE AND BIND HIS PRINCIPAL for labor and material is not given by implication from the nature of the business to an agent employed in the manufacture of carriages: *Paige v. Stone*, 43 Am. Dec. 420, and note; see also *Hay v. Mayer*, 34 Id. 453, and note.

GUARANTY OF VOID NOTE IS ALSO VOID: *Smith v. Dickinson*, 44 Am. Dec. 306, and note.

PARTIAL OR TOTAL FAILURE OF CONSIDERATION IN PROMISSORY NOTE may, in an action at law, be legitimately introduced in evidence: *Brewer v. Harris*, 41 Am. Dec. 587, and note.

THE PRINCIPAL CASE IS CITED AND DISTINGUISHED in *Salmon v. Hoffman*, 2 Cal. 138.

CRAIG v. GODFREY.

[1 CALIFORNIA, 415.]

AUCTIONEER'S MEMORANDUM OF SALE.—An entry in the sale book of an auctioneer in the afternoon of the same day the sale occurred does not comply with the requirements of that section of the statute of frauds which requires the entry to be made at the time of the sale.

AUCTIONEER IS AGENT OF BOTH PARTIES AT TIME OF SALE.—As his authority ceases at that time, an entry by him in his sale book at a subsequent period does not bind the purchaser.

DAY WILL NOT BE CONSIDERED UNIT OF TIME to the prejudice of the rights of parties, and the very point of time when an act was done may be inquired into.

Action against purchaser at auction. The sale took place in the forenoon.

Calhoun Benham, for the plaintiff.

Hall McAllister, for the defendants.

By Court, **HASTINGS, C. J.** The liability of the defendants depends upon a construction of the statute of frauds, in relation to sales by auctioneers, in favor of the validity of whose sales it is enacted as follows: That the "auctioneer shall, at the time of sale, enter in a sale book a memorandum, specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale is made," etc. The name of the person on whose account the sale was made was not written in the sale book until the evening of the day of sale, or during the next day. The memorandum then was not made at the time, and therefore the sale was not binding. This objection is not merely technical. The memoranda of auctioneers are the substitutes for contracts, reduced to writing, and signed by the parties. The auctioneer is the agent of each party at the time of the sale,

and not afterwards. On the part of the defendants, this contract was not executed until after the sale was closed. The auctioneer then had no authority to bind the defendants, by signing their name to the contract, or entering it in the sale book, which in effect is the same thing. The case of *Hicks v. Whitmore*, 12 Wend. 548, cited by counsel, is precisely similar to this case, and settles the question, the statute of New York being the same. The court held in that case, that a memorandum entered in the name of the person on whose account the sale was made, but one hour after the sale, would not bind the vendor. It is therefore unnecessary to examine the other points of the appellants, believing the sale to be void for the reason above stated.

Respondent contends, that inasmuch as a day is to be considered a point of time, therefore, if the memorandum was made during the day, it was made at the time of the sale. Most of the fiction about time, and the computation of time, is not now recognized as law, and especially by this court, as in the case of *The People ex rel. Campbell v. Clark*, 1 Cal. 406, we held that a day is not to be considered a unit to the prejudice of the rights of a party, and that an examination should be had of the very point of time when an act was done, as the approval of an act of the legislature by the executive.

The judgment is reversed. —

SIGNING OF PURCHASER'S NAME BY AUCTIONEER to the memorandum of the sale must be contemporaneous with the sale: *Davis v. Rowell*, 13 Am. Dec. 338, note page 399.

THAT AUCTIONEER IS AGENT OF BOTH PARTIES, see above note; also *Episcopal Church v. Wiley*, 30 Am. Dec. 386; *Smith v. Jones*, Id. 498; *Meadows v. Meadows*, 15 Id. 645; *Davis v. Robertson*, 12 Id. 611; *Singstack v. Harding*, 7 Id. 669, and the notes to above cases.

LAW REGARDS FRACTIONS OF DAY when time is material, and will take notice of the hour of the day at which an act was accomplished: *Mette v. Bright*, 32 Am. Dec. 683, and note; *Williamson v. Farrow*, 21 Id. 492; *Murfree v. Carmack*, 26 Id. 232, and note 234, where the subject is extensively discussed; also *Biggam v. Merritt*, 12 Id. 576, and note.

ROGERS v. HUIE.

[1 CALIFORNIA, 429.]

DILIGENCE IN SERVING SUBPOENA—NEW TRIAL.—Party who does not make an effort to subpoena his witnesses until the day of the trial, and then leaves his subpoenas upon the desk of the clerk, who neglects to serve them, does not use due diligence, and a new trial will not be granted because of the absence of said witnesses.

IN ALL CASES WHERE NEW TRIAL IS MOVED FOR UPON GROUND OF SURPRISE OR NEWLY DISCOVERED EVIDENCE, the party must in his affidavit set forth such evidence clearly and explicitly, and if possible procure the affidavits of the parties whose testimony would constitute such new evidence.

IN AFFIDAVIT ON MOTION FOR NEW TRIAL, a party who states that he has a good defense must state wherein said defense consists.

AUCTIONEER WHO RECEIVES AND SELLS STOLEN PROPERTY is liable for the conversion to the same extent as any other merchant, and there is no principle of policy for the encouragement of trade or convenience of business under which he can claim an exemption.

ONE WHO RECEIVES AND SELLS STOLEN PROPERTY MAY BE HELD LIABLE FOR DAMAGES in a civil action, although it does not appear that the felon has been prosecuted for the theft.

NO SUCH THING AS MARKET OVERT IS KNOWN TO OUR LAWS.

ACTION of trover. Plaintiff alleged in his complaint that he was the owner of a quantity of butter and cheese, which was stolen, and sold to the defendant, an auctioneer in the city of San Francisco, who converted the same to his own use. Defendant filed a general denial. At the trial the plaintiff established the above facts, but did not endeavor to show that defendant acted otherwise than in good faith. The thief had never been convicted for the larceny. Judgment for plaintiff. Defendant afterwards applied for a new trial, and in his affidavit stated that he had been taken by surprise by the absence of certain witnesses, that upon the morning of the day of the trial he had procured subpoenas for said witnesses, which he had left upon the desk of the clerk, that they might be served by him, but that by accident said clerk had neglected to serve them. He also stated that he had a good, substantial, and meritorious defense, which he could establish by the aid of said witnesses. The court refused to grant a new trial, and defendant took this appeal.

Benham, for the appellant.

Noyes, for the respondent.

By Court, **BENNETT, J.** The first point which I shall consider is, whether a new trial should have been granted; and this depends upon the question whether the affidavits on the part of the defendant, presented to the consideration of the district judge sufficient facts to require him to grant a new trial. The application ought not to have been granted, unless the defendant had used due diligence in endeavoring to procure the attendance of his witnesses. Did he use such diligence? I think not. His witnesses had not been subpoenaed, as appears from his own

affidavit. Did he make reasonable efforts to have them subpoenaed? I think not. He made no attempt to subpoena them until the morning of the day on which the trial was to take place, and actually did take place. This was not using due diligence. For this reason alone the court properly denied the motion for a new trial.

There is also another defect in the papers upon which the motion for a new trial was made. The affidavits do not state the facts which the defendant expected to be able to prove by his absent witnesses. In all cases in which a new trial is moved for, on the ground of surprise or on the ground of newly discovered evidence, the evidence which the party moving expects to be able to produce on the second trial should be fully and distinctly set forth in the affidavits on which the application is based, in order that the court may see whether the testimony, if given, could have any legal effect on the result of the controversy. And, as a general rule, the party ought not to rely on his own single and unsupported statement, but should, if possible, by the exercise of due diligence, procure the affidavits of the persons whose testimony he deems material, so that the court may be satisfied as to what facts they will testify: *Ruggles v. Hall*, 14 Johns. 112; *Hollingsworth v. Napier*, 3 Cal. 182 [2 Am. Dec. 268]; *Kendrick v. Delafield*, 2 Id. 67; *Denn v. Morrell*, 1 Hall, 382. In the case at bar it does not appear that the witnesses who were absent could have testified to any state of facts which would have influenced the result. The same reasoning also applies to that portion of the defendant's affidavit, in which he states that he has a good and substantial defense. He does not set forth specifically wherein that defense consisted. A new trial should never be granted on such a general statement. If this practice were to be sanctioned, there would be no limit to applications for new trials. The court properly denied the motion.

An auctioneer who receives and sells stolen property is liable for the conversion to the same extent as any other merchant or individual. This is so both upon principle and authority. Upon principle there is no reason why he should be exempted from liability. The person to whom he sells, and who has paid the amount of the purchase money, would be compelled to deliver the property to the true owner or pay him its full value; and there is no more hardship in requiring the auctioneer to account for the value of the goods than there would be in compelling the right owner to lose them, or the purchaser from the auc-

tioneer to pay for them. As a general rule, any person who assumes and exercises a control over the property of another, without right or authority, must respond in damages to the value of the property; and I see no principle of policy for the encouragement of trade, or for convenience in the transaction of commercial business, under which an auctioneer should be permitted to claim an exemption from the general rule.

Upon authority the case is clear. The very point was decided in *Hoffman v. Carow*, 20 Wend. 21; S. C., 22 Id. 285. That case is in all respects analogous to the case at bar, and both the supreme court and the court of errors held the auctioneer liable. Senator Verplanck, in the court of errors, Id. 319, speaking of the policy of the rule, uses the following language: "In this instance, the ruin falls hardly upon innocent and honorable men; but looking to general considerations of legal policy, I can not conceive a more salutary regulation than that of obliging the auctioneer to look well to the title of the goods which he sells, and, in case of feloniously obtained property, to hold him responsible to the buyer or the true owner, as the one or the other may happen to suffer. Were our law otherwise in this respect, it would afford a facility for the sale of stolen or feloniously obtained goods, which could be remedied in no way so effectually as by a statute regulating sales at auction, on the principles of the law as we now hold it."

Does the common law protect the defendant from an action on the ground that the thief has not been prosecuted and convicted? In some of the American cases, the rule that a felony suspends all right of private redress is said to rest on a salutary principle of public policy, being designed to stimulate to the prosecution of offenders: *Foster v. Tucker et al.*, 3 Greenl. 458 [14 Am. Dec. 243]; *Boody v. Keating*, 4 Id. 164. In other cases it is treated as a technical rule, and it is doubted whether it exists at all in this country, or at least to more than a very limited extent: *Manufacturers' etc. Bank v. Gore*, 15 Mass. 78 [8 Am. Dec. 83]; *Boardman v. Gore*, Id. 331, 335, et seq.; *Pettingill v. Rideout*, 6 N. H. 454 [25 Am. Dec. 473]; *Allison v. Bank*, 6 Rand. 204, 223; *Piscataqua Bank v. Turnley*, 1 Miles, 312; *Plummer v. Webb, Ware*, 78.

But this is not a case in which the common-law doctrine that the civil action is merged in the felony is applicable. The action is not against the thief himself, but against a third person, who, although innocently and in good faith, yet without right, has assumed to exercise a control over the property of the

plaintiff. In *Stone v. Marsh*, 6 Barn. & Cress. 564, Lord Tenterden says: "There is, indeed, another rule of the law of England, viz., that a man shall not be allowed to make a felony the foundation of a civil action; not that he shall not maintain a civil action to recover from a third and innocent person that which has been feloniously taken from him; for this he may do if there has not been a sale in market overt; but that he shall not sue the felon." In *White v. Spettigue*, 13 Mee. & W. 602, the doctrine of Lord Tenterden was carried into an express adjudication. It was there held that an action of trover was maintainable to recover the value of goods which had been stolen from the plaintiff, and which the defendant had innocently purchased, although no steps had been taken to bring the thief to justice, on the ground that the obligation which the law imposed on a person to prosecute the party who has stolen his goods, did not apply where the action was against a third party, innocent of the felony. Pollock, C. B., says: "The court of king's bench correctly explained the law in the case of *Stone v. Marsh*, and the rule of public policy which prevents the assertion of a civil right, in respect of which a felony has been committed, applies only to proceedings between the plaintiff and the felon himself, or, at the most, the felon and those with whom he must be sued, and does not apply to a case like the present, where the action is brought against a third party, who is innocent of the felonious transaction." All other judges expressed opinions the same in substance as that declared by Pollock, C. B. That case is decisive upon the point under consideration.

It only remains to add, that no such thing as market overt is known to our laws. The judgment should be affirmed.

Ordered accordingly.

NEWLY DISCOVERED EVIDENCE TO BE GROUND FOR NEW TRIAL must appear to be material and not cumulative, and it must also appear that the party was not guilty of negligence in not producing it at the former trial: *Schlencker v. Risley*, 38 Am. Dec. 100, and note; *Myers v. Brownell*, 16 Id. 729; *Doubleday v. Makepeace*, 28 Id. 33; *Deputy v. Tobias*, 12 Id. 243.

AFFIDAVIT ON MOTION FOR NEW TRIAL, what to contain: See *Forester v. Guard*, 12 Am. Dec. 141, and note 143. The principal case is cited and followed in *Case v. Coddington*, 38 Cal. 191, on the point that an affidavit setting forth that the defendant has discovered new evidence is insufficient, when it shows no excuse for not producing certain witnesses at the trial, and does not set forth the facts upon which he proposes to convince an adverse witness that he was wrong: See also *Brooks v. Lyon*, 3 Id. 113. That affidavit should be accompanied by affidavit of the newly found witnesses, see *Jenny Lind Co. v. Bower*, 11 Id. 194; *Arnold v. Skaggs*, 35 Id. 684; *People v. Jocelyn*, 29 Id. 562.

THE PRINCIPAL CASE CAME UP BEFORE THE SUPREME COURT of California at a later date (2 Cal. 571), where the court held that an auctioneer who, in the regular course of his business, receives and sells stolen property, and pays over the proceeds of sale to the felon, without notice that the goods were stolen, is not liable to the true owner, as for a conversion. This opinion by the court seems to be contrary to the above decision, but for some reason the principal case is not mentioned in this latter decision. See further, for liability of auctioneer, *Kock v. Branch*, 44 Mo. 542, and *Morris v. Hall*, 41 Ala. 511, both citing the principal case.

INNIS v. THE STEAMER SENATOR.

[1 CALIFORNIA, 459.]

APPEAL MAY BE TAKEN TO HIGHER COURT, without moving for a new trial in the court below.

COLLISION OF VESSELS—NEGLIGENCE.—A vessel moored in line of usual travel in a harbor should carry lights, and its failure to do so constitutes such negligence as will prevent its owner from recovering damages sustained by reason of a collision caused by such failure.

IT IS NOT TO BE UNDERSTOOD THAT ALL VESSELS SHOULD SET A GUARD or exhibit lights, but only such as are moored or anchored in "harm's way."

DECLARATIONS OF AGENT, to be admissible, must form part of the *res gesta*. **MERE NARRATION OF EVENT AFTER IT IS FULLY ENDED** does not form part of the *res gesta*.

PARTY WHOSE DECLARATIONS WERE IMPROPERLY INTRODUCED IN EVIDENCE afterwards takes the stand and testifies in exact accordance with said declarations: *Held*, that the court can not say that their admission resulted unfavorably to the defendant.

IMPROPER EVIDENCE ADMITTED AGAINST OBJECTION of the defendant is ground for new trial.

APPEAL from the district court. The opinion states the facts.

M. H. McAllister, for the plaintiff.

A. T. Wilson, for the defendant,

By Court, **HASTINGS, C. J.** I think a new trial should have been moved for by the defendant's counsel, and that without such motion made and overruled, in no case should this court interrupt the verdict of a jury; but this court, in several cases, myself dissenting, has determined otherwise. It appears that the ship *Rhode Island* was freighted mainly with lumber, and moored near, if not in, the usual track, or in the line of steamers and other vessels entering the harbor, further down the bay than where vessels usually discharge; that she exhibited no lights, and had no watch on her decks; that vessels on either side of her hoisted lights; that in this harbor some vessels, when moored, set a watch and lights, and some do not. Upon

the question whether it is customary or required by prudence to set a watch or hoist lights, there was conflicting testimony. At the time of the collision the atmosphere was hazy, and the vessel was obscured by the shadows of the hills. It is not contended that the accident was willful or was occasioned by the gross negligence of those in command of the steamer Senator. It appears from the testimony of several witnesses on the lookout at the time, that the collision was merely accidental, and could not be avoided after the Rhode Island was first visible. The court gave nearly all the instructions asked on either side, there being twenty on the part of the defendant, which were all given but two.

It is contended on the part of the respondent that the defendant can not complain of the ruling of the court on these instructions; and on the part of the defendant it is said the giving of all the instructions asked on either side had a tendency to mislead and confuse the minds of the jury. It is evident that the instructions of the court were favorable to the defendant, and from the testimony of all the witnesses it is clear that the Rhode Island, moored where she was, without lights or a watch, was in fault; and for the reason that the jury found against the instruction of the court, and against the evidence which clearly shows some negligence on the part of the Rhode Island, the verdict should have been set aside and a new trial granted. In the case of *Simpson v. Hand*, 6 Whart. 324 [36 Am. Dec. 231], the court say, as contended by counsel, that "a vessel is doubtless not bound to show a light when she is moored out of harm's way, and that it was proved, in that case, to be a custom of the river (Delaware), in nights of unusual darkness, to set a light. The Rhode Island was not so moored, and no custom is so well established in this harbor as to be recognized as the law of the harbor."

I think the court should have instructed the jury that want of a light and a watch, in the position of the Rhode Island, was such negligence on her part as to prevent a recovery. In the case above cited, Chief Justice Gibson says: "Indeed, the hoisting of a light is a precaution so imperiously demanded by prudence that I know not how the omission of it could be qualified by circumstances, any more than could the leaving of a crate of china in the track of a railroad car; or how it could be considered other than as negligence *per se*." In that case it was clearly proved that defendant's vessel was in fault, and that, being under sail, the mate discovered the Thorn in time

to avoid her and prevent the collision, but neglected to do so; yet the court, upon the principle that the Thorn was in fault for want of a visible light and a watch, decided that the plaintiff could not recover. So we decided in the case of the Caleb Curtis at the last term. It is not to be understood that all vessels moored should set a watch or exhibit lights, but such only as are moored or anchored in "harm's way," that is, in or near the usual track of daily steamers, or the usual entrance to any part of the harbor.

I think, therefore, the judgment should be reversed.

BENNETT, J. This was an action brought by the plaintiff to recover damages resulting from a collision between the steamer Senator and the ship Rhode Island. At the trial, evidence was given, after exception by the defendant, of statements made by the master of the Senator, the morning after the collision took place. These declarations were, that the Senator ran into the Rhode Island because the captain of the Senator was deceived by lights carried by two vessels, one on each side of the Rhode Island; that he saw the Rhode Island, but supposed she was farther off than she actually was; that she was concealed under the shadow of the hill, and he had not time to back the steamboat and prevent the collision.

There can be no doubt about the inadmissibility of this evidence. The declarations of an agent are not competent, except when they form a part of the *res gestæ*; and the declarations objected to, in this case, form no part of the *res gestæ*, but are a mere narration of an event which had taken place and was fully ended: Story on Agency, secs. 135-138; *Thalhimer v. Brinckerhoff*, 4 Wend. 394 [21 Am. Dec. 155]; *Hubbard v. Elmer*, 7 Id. 446 [22 Am. Dec. 590]; *Mateer v. Brown*, 1 Cal. 221 [52 Am. Dec. 303].

The counsel for the plaintiff, however, says, that although this evidence may have been inadmissible, it could not have prejudiced the defendant, because the master was himself called afterwards and testified in the cause. If his testimony were, in truth, the same as his declarations proved, it would have resulted that the declarations could have had no influence on the verdict of the jury. But I think the two are not so entirely the same as to warrant us in saying that the declarations could not possibly have operated unfavorably to the defendant. Upon this ground, and this alone, I think a new trial should be granted.

The other questions raised at the trial were properly disposed

of, and taking the whole charge of the court together, the case was fairly submitted to the jury.

New trial ordered, costs to abide the event.

FAILURE TO KEEP SIGNAL-LIGHT BURNING ON VESSEL anchored in the channel of the Delaware river at night, and to maintain a proper anchor-watch on board the vessel, is such negligence as to prevent a recovery by the owner of goods carried thereon, against the owner of a vessel in motion colliding with such anchored vessel: *Simpson v. Hand*, 36 Am. Dec. 231, and note; also *Casley v. White*, 32 Id. 259, and note.

FOR FULL DISCUSSION OF RIGHTS AND LIABILITIES of different parties growing out of collisions, see notes to *Broadwell v. Swigert*, 45 Id. 47, and *Van Hern v. Taylor*, 41 Id. 279.

CONFESSIONS OF AGENT, except where they are made at the time, and compose a part of the acts done by him for his principal within the scope of his authority, are not evidence against the principal: *Roberts v. Burks*, 12 Am. Dec. 325, and note.

THAT DECLARATIONS OF AGENT ARE INADMISSIBLE to bind the principal if made after the transaction has closed, see *Whiteford v. Burckmyer*, 39 Am. Dec. 656, note.

WHERE IRRELEVANT TESTIMONY IS ADMITTED against objection, a motion for a new trial will be granted without inquiring how far such testimony might have influenced the verdict: *Myers v. Malcolm*, 41 Am. Dec. 744, and note.

THE PRINCIPAL CASE IS CITED in *Gerke v. Cal. Nav. Co.*, 9 Cal. 251, where certain facts are held to constitute part of the *res gesta*. See also *Garfield v. K. F. & T. M. W. Co.*, 14 Id. 37.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

GLENDALE WOOLEN CO. v. PROTECTION INS. CO.

[21 CONNECTICUT, 19.]

INSURANCE CONTRACT IS ONE OF INDEMNITY UPON TERMS and conditions specified in the policy, and unless those terms are complied with, the assured can not recover.

DISTINCTION BETWEEN REPRESENTATION AND WARRANTY IN INSURANCE CONTRACT is that the former precedes and is not part of the contract, and need be only materially true; while the latter is part of the contract, and must be strictly fulfilled or the policy is void.

WHETHER REPRESENTATION IN SURVEY PRECEDING FIRE POLICY is to be regarded as a technical warranty, though referred to in the policy, is doubtful; but if a condition of the policy makes the survey a warranty, then it is so.

REPRESENTATION IN SURVEY PRECEDING FIRE POLICY THAT "THERE IS A WATCHMAN NIGHTS—no clock—bell is struck every hour," in answer to the questions, "Is there a watchman, etc., during the night?" and, "Is there a good watch-clock?" where, by the conditions of the policy, the survey is made a warranty, amounts to an exact engagement that the insured will keep a watchman upon the premises through the hours of every night, and a breach of such engagement, by having no watchman on duty between Saturday night at twelve o'clock and daylight on Sunday morning, during which a loss occurs, avoids the policy, and precludes a recovery.

PAROL EVIDENCE OF PRIOR OR CONTEMPORANEOUS CONVERSATIONS, CIRCUMSTANCES, USAGES, etc., is inadmissible to contradict, control, or explain an unambiguous written contract.

WORD "DURING" MUST BE CONSTRUED with reference to the subject-matter, as meaning either some time within a certain period or as including the whole of such period. The latter is the proper construction, when an applicant for insurance is asked whether there is a watchman on the premises "during the night."

EVIDENCE OF USAGE IN PARTICULAR MILL OR LOCALITY, as to keeping a watchman during Sunday in manufacturing establishments, is inadmissible to control an insurance policy not ambiguous.

ACTION on a fire insurance policy on plaintiffs' mill. Plea, the general issue, with notice of special matter. It appeared that the negotiations for the insurance were entered into and conducted with certain agents of the insurance company in Massachusetts, who countersigned the policy. The plaintiffs' mill was in Berkshire county, Massachusetts. The defense was a breach of an alleged warranty that a watchman was kept in the insured mill at night. The survey, which was, by a condition of the policy, made a warranty, contained certain interrogatories and answers, which are sufficiently stated in the opinion, respecting the keeping of a watchman, hours of work, etc. It appeared that the mill was burned between midnight on a certain Saturday and four o'clock on Sunday morning, and that there was no watchman in the mill at the time. Evidence was offered by the plaintiffs, and admitted against the objection of the defendants, to show that it was a practice of the plaintiffs' mill, and other mills in the county of Berkshire, which practice was common and known to the defendants and their agents, for the watchman to leave the mill at midnight on Saturday, and to return to it on Sunday at midnight; which practice or usage, and the defendants' knowledge of it, were denied by them. The plaintiffs asked an instruction to the effect that if such usage existed in Berkshire county and was known to the defendants' agents, the policy must be presumed to have been made in accordance therewith, especially as the policy was ambiguous, as they claimed, and that if such usage was common and well known in Berkshire county, where the defendants' agents resided, their knowledge of it must be presumed. They also asked instructions to the effect that the answers to the interrogatories in the survey were not warranties, but representations only. These instructions were refused, and the court instructed the jury in substance that the statements in the survey were warranties; that the word "night" meant the time of darkness between the leaving of the mill at the close of the day and their returning to it in the morning; that the word "sabbath," in the answers to the interrogatories, meant the space of time on Sunday between the hours of ordinary beginning and ceasing work on other days; that if there was no watchman on duty at the time the fire was shown to have occurred, but the mill was left alone, there was a breach of warranty, though that was the

practice of the mill, unless it was shown to have been a general, uniform, and notorious practice and usage at such establishments; that the usage need not be universal, but could not be deemed general if confined to a few mills or a small region of country; and that if a general usage were shown, the plaintiffs must show that they had observed it in this case. The jury found for the plaintiffs, but in answer to a question of the court, stated that they had not agreed as to the usage, when the court stated that that was the only question submitted to them, and returned them to a further consideration of the case. They afterwards found for the defendants. Motion for a new trial, for misdirection.

Toucey and Chapman, for the motion.

Hungerford and T. C. Perkins, contra.

By Court, ELLSWORTH, J. We have delayed the decision of this case, that we might more fully reflect upon the important questions presented, and come to a decision that would be satisfactory to ourselves.

We shall not follow the learned counsel over all the ground taken by them in the argument, nor comment upon all the law of insurance which they have have so earnestly pressed upon our notice, but only such as we consider applicable and important in arriving at a just decision of the case in hand.

The contract of insurance, as all know, is a contract of indemnity, upon the terms and conditions specified in the policy of insurance. It is a peculiar contract—and one of hazard purely. The insurer undertakes, for a comparatively small premium, to guarantee the insured against loss or damage, upon the exact terms and conditions agreed on, and upon no other. The party called upon to pay in case of loss may therefore justly insist upon the fulfillment of these terms; and if the plaintiffs can now bring themselves fairly within the conditions of the policy, as they insist they can, they are entitled to recover for the loss; but if they can not, then they must admit they can not recover; however well meaning and upright, and however confident in their view of the terms and conditions of the policy. We may not make a new contract for the parties; but rather it is our duty to enforce and carry out one already made. What that contract is, upon a just interpretation of the facts and provisions of this survey and policy, we consider entirely clear and certain.

But before entering upon this question, we remark upon an-

other, much dwelt upon in the argument, and of general importance: the distinction between a representation and a warranty. The former precedes and is no part of the contract of insurance, and need be only materially true; the latter is a part of the contract and policy, and must be exactly and literally fulfilled, or else the contract is broken and the policy becomes void. And although this distinction is not important, as we conceive, in this instance, nor the other point so much urged, that the policy is to be construed by the laws of Massachusetts, and not by the laws of this state (though we think they are the same in a case situated as this is), it may not be unimportant to observe, that the above distinction, if applied, in all its stringency and technical exactness, to fire policies, must, ere-long, present questions of unusual interest and importance.

Fire policies are issued upon certain interrogatories and answers, denominated the survey, often extending over two or more pages, and embracing, not only the present but the future condition of things, and the future conduct of the insured; while marine policies are usually taken out for a single voyage, or if on time, for one of short duration. We are by no means confident that representations in surveys, preceding the issuing of fire policies, extending, as they do, to the present and future condition of the property about to be insured, have been considered as technical warranties, to be true to the letter, for a long series of years, and not rather as representations, to be, at the time and thereafter, substantially exact and true. Nor are we certain that a mere reference to these representations made in the body of the policy, in order to explain the rights and obligations of the parties, does necessarily change their character from representations to warranties. Fire policies are taken out in mutual offices, for a term of years, and in ordinary insurance companies for one year or a longer period. If, now, all the interrogatories and answers, or survey, as it is called, are to be held to be warranties, to be kept to the letter during the continuance of the policy, and not in the nature of representations, to be kept in substance and effect; and if this vital change in what is only preliminary is to be brought about by a mere reference, in the body of the policy, to the survey; then there is a principle of the law of marine insurance being applied to policies of a different character which must ere-long, as we have said, present questions of unusual interest and importance. If, on the other hand, the survey is held to be a representation of agreement, extending to the future as well as the present

condition of things, then the insured will have no ground of complaint, as in that case he will be holden only to a substantial compliance with his own agreement, which is but just and right.

This question has engaged the attention of courts elsewhere. In *Houghton v. The Manufacturers' Mutual Fire Insurance Company*, 8 Met. 114 [41 Am. Dec. 489], there were thirty-six printed questions annexed to the policy; among them were these: "What provision is made for extinguishing fire, by engines, pumps, water-casks, buckets, or otherwise?" Answer: "Water-casks are placed in each room, containing water, and pails are kept in each room. There is a force-pump inside to convey water into the second and third stories." "Is a watch kept constantly in the building? If no watch is kept constantly, state what is the arrangement respecting it." Answer: "No watch is kept in or about the building; but the mill is examined thirty minutes after work." "During what hours is the factory worked?" Answer: "Five o'clock A. M. to half-past eight o'clock P. M. Sometimes extra work will be done in the night." The plaintiffs then claimed that the policy and application were to be construed together, in order to determine what was the contract of the parties; that the statements made in the application, and especially the answers to the questions, were stipulations in the nature of conditions precedent for the truth of the matter stated, so far as they were material to the risk; and if not true, although not willfully false, nor made with intent to deceive, they nevertheless discharge the underwriters; that so far as these answers stated usages, practices, and modes of conducting business at that factory in the nature of precautions against fires and tending to diminish the risk of fire, the insured were bound to observe all such usages and modes of conducting their business, and continue to use all such precautions; and if they failed so to do, the underwriters were discharged.

The court held: 1. That the policy, by the manner in which it refers in terms to the application and representations, does legally adopt and embody them, as part of the contract, to the same effect as if they were recited and set forth at large in the policy. 2. That the application and various answers contained in it, being termed "representations" in the policy, are rather to be regarded as having the legal effect of representations than as warranties, as understood in the law of marine insurance, though partaking, in some measure, of the character of both. They are like representations in requiring that the facts stated

shall be substantially complied with, but not like warranties in requiring an exact and literal compliance.

These answers were held to be embodied in the policy as a part of the contract of insurance, and they would hence strictly be warranties in marine policies, to be satisfied only by an exact and literal performance. But this consequence is avoided by holding the answers to be representations, although for the future, and although incorporated in the policy itself. They were obligatory only, as an executory undertaking, satisfied by performance in substance and effect.

In the *Farmers' Insurance and Loan Company v. Snyder*, 16 Wend. 481 [30 Am. Dec. 118], the question was, whether a certain survey referred to thus in the policy, "More particularly described in application and survey furnished by themselves (the plaintiffs), filed, No. 938, in the office of the underwriters," was a representation or a warranty. It was adjudged to be a part of the contract, and therefore not a representation collateral and preparatory to the contract; yet the chancellor, in giving the opinion of the court, would not admit it was a warranty. His language is: "I have doubts whether the principle of construing every matter of mere description contained in the body of the policy, although not material to the risk, into an express warranty, which is to be literally complied with, should be applied with the same strictness to fire policies:" p. 493 [30 Am. Dec. 123].

In *Alston v. The Mechanics' Mutual Insurance Company of Troy*, 4 Hill, 330, the chancellor, in giving the opinion of the court, goes at great length into the distinction between representations and warranties. He utterly repudiates the idea of a promissory representation, and insists that no such thing is recognized by any respectable authority whatever; while at the same time, if the promissory representation is embodied in the policy, so as to be a part of the contract, it will be binding as something in the nature of a warranty, as a representation, as in Massachusetts, to be substantially and materially true: p. 342.

In *Wood v. Hartford Fire Insurance Company*, 13 Conn. 533, 545 [35 Am. Dec. 92], this court seem to have applied the strict technical rules of marine insurance to fire policies, and they accordingly held, that language in a policy as follows: "Upon the one undivided half of the paper-mill owned by the plaintiff in Westville, in New Haven," under the circumstances, made a warranty, and that the mill must continue to be a paper-mill,

neither more nor less, or the policy would immediately become void. This application of the rule, if the court concurred in the views expressed by its organ, seems to maintain the entire similarity between marine and fire policies. And this is undoubtedly true, if it be conceded that the description and reference in the policy make a warranty. But we are not aware that the court meant to hold that, in all cases, everything which gets into a policy, as description or mere reference, whether survey or answers, is an exact warranty, and not representation. This would be a very broad principle of law, of great importance, demanding mature and careful consideration before we sanction it, and one which we are not called upon to decide in this case; because, however the general principle may be, here there is no question of the kind for decision.

It is certain that in this case the plaintiffs have not kept their agreement in substance or effect. And besides, the parties have agreed, in the eighteenth condition of the policy, that the survey shall be treated as a warranty.

We would add further, that the general question is elaborately discussed in *Jennings v. Chenango County Mutual Ins. Co.*, 2 Denio, 75; and many cases are commented on. The words of reference there in the body of the policy are: "Reference being had to the application, etc., for a more particular description of the conditions annexed, as forming a part of this policy." The court held that as the survey was made a part of the policy, then by the acknowledged rule of marine insurance, it became a warranty, and must be literally true, and so continue. Many cases are likewise cited, in the learned opinion of the court, given by Jewett, J., going to show that most, if not all, the evidence offered and relied upon by the plaintiffs in the case before us was not admissible or important; such as prior or contemporaneous conversation or agreements between the parties, the knowledge of the agent, local usages, and any and every circumstance or collateral proof intended to qualify or contradict the written contract in the survey and policy.

The same views are presented by the chancellor in giving the opinion of the court already referred to in *Alston v. The Mechanics' Mutual Insurance Company*, 4 Hill, 330.

We come, then, to the immediate question before us, What is the contract, as to the particular in question, in this policy of insurance? We say it is, in our judgment, an exact, clear, and certain engagement, by the insured, that they will keep a watchman in their mill through the hours of every night in the week,

from eight p. m. to the usual hour of commencing work in the morning. If this is the true engagement of the plaintiffs, then they can not recover on the policy; for it is conceded by them that they had no watchman in the mill after twelve o'clock Saturday night, and the mill was burned down between three and four o'clock the next morning; which doubtless would not have happened had the watchman remained, as he should have done. If we have the precise contract which the parties chose to make for themselves, and there be no imperfection or ambiguity in the language used to express the meaning of the parties, clearly we have no right to depart from the language and travel out of the contract to see if the parties did not, after all, mean something different from what is written. Why, we ask, resort to inferior and secondary evidence, such as inferences from supposed usages, or circumstances, or the knowledge, or the talk of the parties at the time of entering into the contract? These may be proper enough where there is ambiguity or uncertainty in the language used, as when technical and scientific words are used, or terms of art, or trade, or foreign language, or phrases, which require an interpretation or explanation in order to know what the parties meant. But this is not the case. And hence the numerous authorities and elementary writers read by the plaintiffs' counsel, showing that collateral evidence may be, in certain cases, resorted to to interpret the terms used, are quite inapplicable and unimportant: See *Stoevers v. Whitman's Lessee*, 6 Binn. 416; *Allen v. Dykers*, 3 Hill (N. Y.), 593, 596; *The Schooner Reside*, 2 Sumn. 567, 569; *Macomber v. Parker*, 13 Pick. 175, 182.

The rule is well established, that when the parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing. After this, to permit oral testimony, or prior or contemporaneous conversation, or circumstances, or usages, etc., in order to learn what was intended, or to contradict what is written, would be dangerous and unjust in the extreme: *Higginson v. Dall*, 13 Mass. 96; *Whitney v. Haven*, Id. 172; *Wiggin v. Boardman*, 14 Id. 12; *Cheriot v. Barker*, 2 Johns. 346 [3 Am. Dec. 437]; *Atherton v. Brown*, 14 Mass. 152; *Weston v. Emes*, 1 Taunt. 115; *Flinn v. Tobin*, 1 Moo. & M. 367; *Parks v. General Interest Insurance Co.*, 5 Pick. 34; *Barber v. Brace*, 8 Conn. 9 [8 Am. Dec. 149].

We must first be convinced that there is doubt and ambiguity in the writing, or we can not admit inferior evidence to explain or contradict what is written. This principle constitutes the great difficulty in the plaintiffs' case. We know not how to get around it, or to surmount it; and we must not reject nor evade it. The plaintiffs must first satisfy us, as we say, that the contract is imperfect and ambiguous, or we can not, with any consistency and fairness, help them to subject the defendants.

The defendants insist, that the contract is not only certain, but just as it should be made, and as they understood it was to be made; that they expected to have a watch each night in the week, and through the night; and if we are to go into reasons, that, during Saturday and Sunday nights, the mill is as much exposed to spontaneous combustion certainly, and more exposed from attempts by incendiaries, than at other times in the week; and they earnestly insist that the plaintiffs shall not erase from the policy the half of Saturday and Sunday nights. We acknowledge that we feel pressed by this view of the case, and we find no answer to it in the argument of the plaintiffs' counsel. As the counsel so earnestly insist we are in error, we look again to see if we are; but we find none. The language in the eighth interrogatory and answers (for here is the imperfection and mistake, if anywhere), used by the insured, leaves no room for hesitation or doubt. If language can express thought, it is expressed in this instance. The survey begins, "Plain and definite answers are requested to each of the following interrogatories." "Please be particular." Then the interrogatory is: "Is there a watchman in the mill during the night?" The word "during" is to be construed with reference to the subject-matter. If one were to promise another that he would do some act, such as execute a deed or pay a sum of money, during the month of January, the word means a point of time between the first and last days of January; but, in a deed conveying land to a woman during her widowhood, it means the whole time, so long as the grantee shall remain unmarried. So a soldier enlisting into the army during the war, is to serve throughout the war. But if we say, a man was killed during the war, or that a certain battle was fought during the war, we mean some point of time between the commencement and end of the war. So in this survey, what did the underwriters aim at in this interrogatory? We think they sought to know if there was a watch kept up all the night, not a part of it, or for one period of time in the hours of the night.

But the interrogatory proceeds: "Is there a good watch-clock?" Here we find something that is to speak for every hour of the night. It is well known that a watch-clock is so constructed that at an exact time in each hour of the night the watchman can insert a plug into a hole that just then appears through the face of the clock, and after that it is covered and concealed, so that the plug can not, by any possibility, be inserted without destroying the clock itself; and so the clock will disclose the fatal truth in the morning. If the watchman has slept or absented himself, he is betrayed. Does not this prove the meaning of the word "during"? Look now at the answer: "There is a watchman nights—no clock—bell is struck every hour from eight p. m. till it rings for work in the morning." Every hour in the night, then, is included in this survey.

The interrogatory, up to this point, having embraced each and every hour of the night, proceeds: "Is the mill left alone at any time after the watchman goes off duty in the morning till he returns to his charge at evening?" The answer is: "Only at meal-times, and on the sabbath, and other days when the mill does not run." We feel confident this last interrogatory relates only to day-time; for the words are, "after the watchman goes off duty in the morning till he returns to his charge at evening." We can not think that any part of the night is excepted from the vigilance of the watchman.

Is there any more ground for the plaintiffs' other claim, that one half of Saturday and Sunday nights are to be excluded from the watch? We see nothing that indicates such an exception. The language of the parties does not; the reason of the thing does not. The language is general—"during the night." What nights? All nights: one as much as another. And why draw a distinction contrary to the language in its plain import, and the reason of the thing too? Why is a watch required any night? For the same reason that exists for every night. And there is an additional reason, as we have already mentioned, for a watch during Saturday and Sunday nights. If, however, in this particular, there be a shade of difference, it is too slight and unimportant for us to proceed upon, and impose a restriction upon language which is general and unqualified.

But it is said the second part of the interrogatory and answer shows that these portions of the two nights are to be excepted. To us it appears quite the reverse. It is obvious the second part of the interrogatory has nothing to do with a watch during the night. The first part is expressly occupied about the night; and, as we

may say, exhausts that topic and subject-matter; and so does its answer. The second part of the interrogatory then follows; and the inquiry is as to the time after the watchman goes off duty in the morning till he returns to his charge at evening; *i. e.*, "Is the mill ever left alone in the day-time?" The answer is, in substance and meaning, Never, except at meal-times, and the day of the sabbath, and other days. It does not reach back to the first part of the interrogatory, as is claimed, departing from the subject-matter of inquiry to say what is done in the night-season, either one night or another. It is what is done in the day-time. The nights have been already disposed of. We say, then, the eighth interrogatory covers every night, and every hour of the night; every day, and every hour of the day; and that the answer, by excepting only meal-times, the day-time of the sabbath, and other days when no work is done, leaves a clear engagement that at all other times there is to be a watchman or workmen in the mill.

This engagement, as we interpret it, might have been considered by the underwriters as important, if not indispensable, in giving terms of insurance; and we can not, therefore, disregard it in meting out even justice to the contending parties.

According to these views, then, it is obvious that the superior court was correct in the course pursued; and that no sound objection lies to the principles of law laid down to the jury.

If, indeed, the survey was to be taken in connection with a general custom, claimed to prevail in mills of this character, then, too, there was no error; for such evidence was received by the court; and the jury, under the instructions of the court, found there was no such custom in fact. On what possible ground the plaintiffs could claim that evidence of a practice in their particular mill, or usage within any defined locality, as in the county of Berkshire, etc., even if brought to the knowledge of the defendants' agent (and his authority to bind the defendants by such knowledge we do not decide), should be received, and when received vary the existing contract, we know not. All previous and contemporaneous conversation, as a part of the final contract, is wholly unimportant and inadmissible; nor is it admissible as matter of representation; for the survey contains that; and the survey may not be contradicted by either party. We repeat, the parties made their own contract in the case of this mill; and so long as the terms of it are clear and certain, it must put an end to all strife about what was intended.

It is claimed by the plaintiffs' counsel that the statute of Mas-

sachusetts respecting the observance of the sabbath has a bearing upon the construction to be put on the language of the survey. We do not so understand it. We do not believe there is any statute in Massachusetts making it unlawful to keep a watchman in this mill, according to the survey, as we interpret it; and if there was, the contract to keep such a watch every night, and every hour of the night, is too plain to be denied; and is, besides, in the nature of a precedent condition, which must be fulfilled, or the underwriters are discharged.

We do not advise a new trial.

In this opinion the other judges concurred.

New trial not to be granted.

CONTRACT OF INSURANCE IS ONE OF INDEMNITY ONLY: *Eager v. Atlantic Ins. Co.*, 25 Am. Dec. 363.

WARRANTIES AND REPRESENTATIONS IN CONTRACTS OF INSURANCE: See *Houghton v. Manufacturers' Ins. Co.*, 41 Am. Dec. 489; *Holmes v. Charlestown Mutual Fire Ins. Co.*, 43 Id. 428; *Frost v. Saratoga Mutual Ins. Co.*, 49 Id. 234; *Clark v. New England etc. Ins. Co.*, 53 Id. 44, and cases cited in the notes thereto. See particularly as to when representations in the application, survey, etc., are to be deemed warranties: *Burritt v. Saratoga Co. Mut. Fire Ins. Co.*, 40 Id. 345, and note. In *Kelsey v. Universal Life Ins. Co.*, 35 Conn. 237, the case of *Wood v. Hartford Fire Ins. Co.*, 35 Am. Dec. 92, is referred to as having gone to the verge of the law in holding statements in an application for insurance, referred to in the policy, to be warranties, and as having been "somewhat questioned" but not overruled in the principal case as applied to fire policies. In *Rogers v. Charter Oak Life Ins. Co.*, 41 Conn. 105, the principal case is cited as one of numerous decisions giving "full and frequent consideration" to the point as to when statements in the application for a policy are to be deemed warranties. In *Eddy St. Iron Foundry v. Hampden etc. Ins. Co.*, 1 Cliff. 306, it is held, citing the principal case, that when the reference in a policy to statements of the assured is not such as to render them technical warranties, as when they are referred to as representations, the reference is nevertheless *prima facie*, if not conclusive, evidence of their materiality so as to render any misrepresentation or concealment therein fatal. The case is followed in *Sheldon v. Hartford Fire Ins. Co.*, 22 Conn. 244, and *Blumer v. Phoenix Ins. Co.*, 45 Wis. 628, on the point that where the assured fails to keep a watchman in an insured mill, as stated in his answer to interrogatories in the survey, he can not recover. In *Aurora Fire Ins. Co. v. Eddy*, 49 Ill. 108, it was held that where it was expressly agreed in an insurance policy that "eight buckets filled with water" were to be kept on the first floor of the insured building, a literal compliance therewith by keeping the buckets always filled with water in the winter-time, when it might be impossible, was not required; but *Glendale Woolen Co. v. Protection Ins. Co.* was referred to as laying down a more stringent rule. The case is cited also in *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 525, and *Kelsey v. Universal Life Ins. Co.*, 35 Id. 237, as an illustration of the fact that the supreme court of Connecticut has maintained the necessity of strict compliance with the conditions of an insurance contract, "in some instances almost to the denial

of justice." In *May v. Buckeye Mutual Ins. Co.*, 25 Wis. 308, the case is referred to as a "direct authority" for the position that the word "survey" in a policy of insurance may be construed to include the entire application.

USAGES, VALIDITY OF, AND WHEN BINDING AS PART OF CONTRACT: See *Bodfish v. Fox*, 39 Am. Dec. 611; *Desha v. Holland*, 46 Id. 261; *Governor v. Withers*, 50 Id. 95; *Farnsworth v. Chase*, 51 Id. 206, and the notes thereto. As to the admissibility of evidence of a usage to explain or control a written or other express contract, see *Cortelyou v. Van Brundt*, 3 Id. 439; *Coit v. Commercial Ins. Co.*, 5 Id. 282; *Avery v. Stewart*, 7 Id. 240; *Livingston v. Ten Broeck*, 8 Id. 287; *Gordon v. Little*, 11 Id. 632; *Farrar v. Stackpole*, 19 Id. 201; *Allegre v. Maryland Ins. Co.*, 20 Id. 424; *Pavey v. Burch*, 26 Id. 682; *Boorman v. Jenkins*, 27 Id. 158; *Sampson v. Gazzam*, 30 Id. 578; *Harris v. Carson*, Id. 510; *Kendall v. Russell*, Id. 696; *Bodfish v. Fox*, 39 Id. 611; *Inglebright v. Hammond*, 53 Id. 430, and notes. In *Leach v. Beardslee*, 22 Conn. 409, the principal case is cited to the point that a usage is never admissible to control or vary clear and unequivocal stipulations in a contract.

PAROL EVIDENCE TO CONTROL OR VARY WRITTEN CONTRACTS generally: See *Rearick v. Swinehart*, 51 Am. Dec. 540; *Pack v. Thomas*, Id. 185, and cases collected in the notes thereto.

CAMP v. GRANT.

[21 CONNECTICUT, 41.]

PARTNERSHIP DEBTS ARE JOINT AND SEVERAL in equity.

PARTNERSHIP DEBTS MAY BE PRESENTED AGAINST ESTATE OF DECEASED PARTNER, under the Connecticut statute, and allowed equally with separate debts whether the surviving partner is solvent and within the jurisdiction of the court or not.

SEPARATE CREDITORS OF PARTNER HAVE NO PRIORITY RESPECTING HIS SEPARATE ESTATE in right of payment over creditors of the partnership, it seems.

APPEAL from a probate court decree. The facts, so far as necessary for the determination of the questions decided by the supreme court, are stated in the opinion.

Dutton and C. Ives, for the appellant.

Hooker, for the appellees.

By Court, ELLSWORTH, J. We think the decree of the court of probate appealed from is correct, and should not be reversed. The facts which are agreed and recited by counsel need not be particularly recapitulated. It appears that Zelotes C. Grant, in the settlement of whose estate the question arises, was, at the time of his death, in November, 1846, in partnership with his brother, C. S. Grant, under the name of Z. C. & C. S. Grant, and that C. S. Grant survived his brother but a short time; that he was likewise in partnership with one Jerome, under the name

of Jerome & Grant, and that Jerome still survives; that Z. C. Grant owed, at the time of his death, some ten thousand dollars of private debts; the company of Z. C. & C. S. Grant some two thousand five hundred dollars; and Jerome & Grant some three hundred and fifty dollars; that Z. C. Grant's estate was represented insolvent, commissioners were appointed, and they gave notice, according to law, for the presentation of claims; that upon examination they found due, and reported to the court of probate, certain private debts against Z. C. Grant, and partnership debts against Z. C. & C. S. Grant, of two thousand two hundred and twenty-nine dollars and forty-four cents, and against Jerome & Grant three hundred and forty-four dollars and sixteen cents; that the judge of probate ordered the assets of Z. C. Grant (being sufficient to pay only sixty-five cents and three mills on the dollar) to be distributed, *pro rata*, among the private and partnership creditors. The appellant, a private creditor of Z. C. Grant, complains of this decree of the court of probate, for the reason that company creditors are allowed to come in *pari passu* with the private creditors of Z. C. Grant. He makes this important question to us, whether, according to law, the estate of a deceased partner is liable to be called upon to pay the debts of the partnership, while there is a surviving partner who is not shown to be insolvent. We think this question does not necessarily arise in this case, as to the debts due from Z. C. & C. S. Grant, as will be particularly stated in the sequel, but only as to the debts due from Jerome & Grant. So far, perhaps, the objection urged by the appellant will lie; and therefore, it becomes necessary for the court, in order to meet the whole case, to examine and decide the general question. This we are more willing to do, because the question is one of great practical importance and of frequent occurrence, much discussed and variously decided elsewhere, but has not received adjudication in our courts.

The estate of Z. C. Grant having been represented insolvent, commissioners appointed, and notice given to bring in claims, it was necessary that within the time appointed by the court, which can never exceed eighteen months, every claim upon the estate should, if ever, be presented to the commissioners for an allowance; and any claim not so presented can never afterwards be paid, except only out of some newly discovered estate. The door is, therefore, absolutely closed against any and all claimants. All the estate in the executors' hands is, by order of the court, distributed among the creditors as soon after the expira-

tion of the time limited and the return of the commissioners' report as is found consistent and practicable.

It is, then, of vital importance to settle correctly what is intended by the word "claims" in the fifty-fifth section of the statute regulating the settlement of estates. This section provides that the creditors shall exhibit their claims to the commissioners for allowance; and then the sixty-first section declares that the payment of claims presented and allowed against the estate shall, after deducting the expenses of the last sickness and the funeral expenses, the taxes, and debts due the state, besides what is set to the widow, be paid, in proportion to their respective amounts.

We think a debt due from a company or partnership, though a member of the partnership is surviving, is a debt or claim against the estate of the deceased partner, which may be presented to and be allowed by the commissioners; because, first, it is within the fair and just construction of the language and the object of the statute; secondly, because a partnership debt is several as well as joint; and thirdly, as to most of the debts in question, it is proved there are no means for payment but the assets of Z. C. Grant.

First, then, as to the statute. The intention of the legislature, as the statute shows, is to have an insolvent estate fully and finally settled, and the avails apportioned among the creditors at an early day; and that no creditor shall participate in these avails who did not present his claim within the time allowed. What now, we ask, shall a creditor having a claim against the partnership do with it in order to secure its payment? Is he driven to commence a suit at once against the surviving partner because he is or may be supposed to be solvent? And if he is in fact solvent, he may, before judgment is obtained against him, become insolvent; so he may abscond from the country, or he may have no property that can be taken in execution, and in the mean time the limitation of presenting claims against the creditor becomes hopelessly remediless. The surviving partner, too, has a deep interest in the presentation of claims to the commissioners. How else will he be safe, if the partnership shall in the end turn out to be indebted to him? He, no more than these creditors of the partnership, can come in afterwards for a share of the estate. Why, then, is not this a claim and a debt within the proper meaning and necessities of the statute? Claims much more uncertain and contingent, if indeed there be here any un-

certainty, are presented and allowed by commissioners every day; and this must be so, or they would be entirely lost. Among the claims reported by these very commissioners is an indorsement of a note for two thousand two hundred and forty-eight dollars and eighty-six cents, which was contingent when reported, but became certain afterwards. The company had indorsed a note, which was not then due, but it was afterwards dishonored by the maker, and the indorsers were compelled to take it up. Thus they obtained payment of their debt in the same proportion with others, which would not have been done had they not presented the indorsement to the commissioners within the time allowed by law.

In the case on trial, the claim was presented and allowed in the same way as contingently just and true. When, we inquire, did this debt cease to be a claim against both and each of the original debtors? It was so before the death of Z. C. Grant. Did his death extinguish the debt or discharge his estate? His death might extinguish the legal remedy on the joint undertaking; but how could it affect the claim, the real indebtedness itself? Is not the debt due from both debtors as before? It may be true that a certain specific remedy is gone, and that as between the partners the surviving partner owes the whole debt, and must, in the end, pay it. But what has the creditor to do with this question? It may be so, and it may not be so. Besides, credit may have been given wholly to Z. C. Grant. His estate is his representative; and as he was himself liable, his estate ought to continue to be so. Certain it is, the debt could have been collected out of his separate estate while in life. Why not, then, after his death? Nothing but a form lies in the way; and this can not be urged against a simple presentation to commissioners.

In the states of Massachusetts and Mississippi, where there are statutes similar to our own, their courts have taken a similar view of this subject with ourselves. They place their decisions as we do, upon the language and intent of their statutes; and they cut loose from the conflicting decisions and unsatisfactory distinctions which are to be found in the English books: *Sparhawk v. Russell*, 10 Met. 305, 307; *Dahlgren v. Duncan*, 7 Smed. & M. 280.

We come to the second reason already mentioned, to wit, partnership debts are several as well as joint. We do not say that this is true of all joint liabilities, such, for instance, as the liability of a principal and his surety; but it is true of partner-

ship debts, and of all debts where the persons indebted were the original debtors, all of them recipients of the consideration received. This will appear to be the good sense and reason of the thing, if we will for a moment lay aside the difficulties which arise from looking at the established forms of redress in courts of law and equity, and which will be particularly noticed in the sequel.

If two or more persons borrow money or take up goods on credit and their joint undertaking, does not each one owe the lender of the money, or the vendor of the goods, the whole sum due? And as much so as if he had acted alone in the transaction? While the debtors were living, could not the creditor levy his execution upon the property of either one of them? And so if one is discharged by bankruptcy, does not the other remain liable as before? Even if one of the debtors be sued alone, he can only object in abatement of the action, which goes simply to the form of the suit, and not to the indebtedness itself. If he does not object in abatement, the proof of a joint debt is proof of his individual indebtedness to the whole amount. And so now, by statute, when the declaration sets out a joint indebtedness, proof of the indebtedness of one is sufficient to subject him without the other. Now, none of this would be proper or just if a partnership debt is not considered to be several as well as joint; if each did not owe the whole, as if he were alone.

The reason they can not be sued severally as well as jointly, where the security is only in form joint, is, that as both debtors were at first liable jointly, the form of the judgment, which either may have to pay, shall continue to show the same joint indebtedness. And this is because the joint debtors are particularly interested in the mode and form of legal proceedings in the case; and because one suit at law ought to determine finally, and among all concerned, every mere joint liability and controversy. So we understand are the authorities. Story, in his *Equity Jurisprudence*, vol. 1, secs. 162, 163, says: "It seems now well established, as a general principle, that every contract for a joint loan is, in equity, to be deemed, as to the parties borrowing, a joint and several contract, whether the transaction be of a mercantile character, or not; for in every such case, it may fairly be presumed to be the intention of the parties, that the creditor should have the several as well as the joint security of all the borrowers for the repayment of the debt." And he further says: "The creditors may at once proceed against the assets of a deceased joint debtor, though there

be a surviving debtor, just as if the form of the security had been joint and several." Sir John Leach, master of the rolls, said, in *Wilkinson v. Henderson*, 1 Myl. & K. 582, 583: "All the authorities establish, that in the consideration of a court of equity, a partnership debt is several as well as joint."

Story, in his late treatise on partnership, section 362, says the doctrine formerly held on this subject seems to have been, that the joint creditors had no claim whatever in equity against the estate of the deceased partner, except when the surviving partners were at the time, or subsequently became, insolvent or bankrupt. But that doctrine has since been overturned, and it is now held, that in equity all partnership debts are to be deemed joint and several. Sir William Grant, in *Devaynes v. Noble*, 1 Meriv. 529, 564, says: "I apprehend, by the general mercantile law, a partnership contract is several as well as joint." Mr. Collyer, in his treatise on partnership, page 580, says: "It is now established beyond controversy, that in the consideration of courts of equity, a partnership debt is several as well as joint." The same is held by Chancellor Kent, in *Hamersley v. Lambert*, 2 Johns. Ch. 511. Like views are expressed in many cases, and in some are authoritatively decided: *Sumner v. Powell*, 2 Meriv. 37; *Devaynes v. Noble*, 1 Id. 589; Collyer on Part., b. 3, c. 3, sec. 4; *Wilkinson v. Henderson*, 1 Myl. & K. 582; *Thorpe v. Jackson*, 2 You. & Coll. 553; Gow on Part. 358, 359; 3 Kent's Com., 4th ed., 64; *Hamersley v. Lambert*, 2 Johns. Ch. 508; *Belknap v. Cram*, 11 Ohio, 411.

The remaining reason for sustaining the decree to the extent of the two thousand two hundred and twenty-nine dollars and forty-four cents, due from Z. C. & C. S. Grant, that the surviving partner became insolvent, and there was no company property remaining to pay the debt.

The facts are these: C. S. Grant, the surviving partner, died soon after his brother, Z. C. Grant, but some time before the decree complained of was made. C. S. Grant was individually insolvent at, and so continued to be after, the death of his brother until his own death, having no property whatever, except for a short time after his brother's death, and partnership property to the amount of seven hundred dollars, which was under an attachment by Bennett, Buckley & Clark, creditors of Z. C. & C. S. Grant, to a larger amount than its entire value. They attached the property before the commissioners met to allow claims. The commissioners allowed the claim, and after this, judgment and execution were obtained

against the surviving partner, as was necessary, and the property was all sold, and the avails applied to extinguish the debt as far as they would go.

Thus it appears that at the time when the court of probate decreed the assets of Z. C. Grant to be distributed among the creditors of Z. C. & C. S. Grant, and C. S. Grant, the surviving partner, had died insolvent, leaving no property of any kind to pay the debts of the company. Of course, upon the admitted principle in courts of equity, that if the surviving partner is insolvent, the estate of the deceased partner may be proceeded against. This debt of two thousand two hundred and twenty-nine dollars and forty-four cents must be paid out of this estate.

The only answer urged to this view is, that this was not the state of things at the death of Z. C. Grant, as there was seven hundred dollars' worth of company property on hand. But we think this makes no difference. We take the state of things at the time the court was called upon to decree what distribution of the funds should be made. The line of duty marked out by those facts is to be pursued by the court. Had the fund, at that time, been subject to an order of a court of equity, as it was to an order of a court of probate, the court would have held the liability of Z. C. Grant's estate to pay the joint debts, to be complete and absolute. The court of probate must do the same.

There is a debt due from Jerome & Grant of three hundred and forty-four dollars and sixteen cents, which stands perhaps on a ground somewhat different. Jerome is still living; and it does not appear but that he is entirely solvent. It does not, it is true, appear that he is certainly solvent, or that he is within the limits of the state; but it is claimed that, in the absence of proof to the contrary, these things will be presumed. Let it be so. Then we have presented the grave question, so learnedly and elaborately discussed at the bar. Can the estate of a deceased partner be proceeded against for the payment of company debts, when there is a surviving partner who is of sufficient ability to pay them?

We suppose, that since the decision in *Ex parte Elton*, 3 Ves. 241, this question has been settled in the negative in England, not, however, as a general rule of equity, but as a rule of convenience in administering the law of bankruptcy. The history of the rule shows that it has never met with favor in England, as a rule of justice and equity. It originated in the peculiar modes of proceedings under joint and several commissions in bankruptcy. Lord Hardwicke first laid down the rule in the nega-

tive. Lord Thurlow thought it so unjust that he would not follow it, and laid down the rule to the contrary. Lord Loughborough restored Lord Hardwicke's rule; and Lord Eldon followed in the same track while he was lord chancellor. The language of Lord Chancellor Rosslyn is: This subject took a different course at different periods, until the time of Lord Thurlow, who considered it with great anxiety, and having consulted most of the judges, expressed his decided opinion that the contrary course was the best, as being the most legal, and therefore held that the joint creditors should be admitted to prove and take dividends under a separate commission. He considered a commission of bankruptcy to be an execution for all the creditors; and as separate property could be taken on an execution against the partners, so it could be taken under such a commission. Lord Loughborough held this rule would be inconvenient in practice, and restored the more ancient rule of Lord Hardwicke. See *Id.*, 238.

So far as any principle of general equity is deducible from what is stated by the learned chancellors, as influencing them to adhere to the ancient rule, it is, that as the separate creditors of one partner are postponed, in the distribution of partnership property, to the joint creditors, so the converse should be true—joint creditors shall be postponed to the private creditors of the partners, in the distribution of separate property. But there is an obvious difference between the two cases. Neither party is permitted to appropriate to his own use company property; nor is the creditor of either party permitted to take, on execution, company property to pay his private debts, while there is not enough to pay the company debts. The partner individually owns only what is left to him after paying the company debts and liabilities; and now, at law even, after much discussion and diversity of practice, it is clearly established, that the creditor of one partner, by attaching company property, attaches only the aforesaid *residuum*. Hence, where there is a joint commission against partners in bankruptcy, it would be the highest injustice, as well as a palpable violation of a clear rule of law, if separate creditors were permitted to take *pari passu* with joint creditors.

We think, too, joint creditors may be said to give credit with special reference to the property of the community; but to this idea we do not attach much importance; and although it may not be sufficient of itself to establish the rule practiced upon by Lord Thurlow, it is clearly a rule of equity, that joint cred-

itors, working through the equities of the partners, shall have a prior lien upon partnership property. But what can be said in favor of the converse of this rule—that joint creditors shall not come in, *pari passu*, with separate creditors, upon private property? Here there are no equities to be worked out in behalf of copartners. So it is true, that private property may be taken, on a joint execution, even to the entire exclusion of private creditors. It is, in truth and equity, a private debt due from each partner absolutely; and hence, if a joint creditor first attaches separate property, he will take precedence in obtaining satisfaction, unless he is defeated by a bankrupt law.

It is possible that, in some cases, private debts are contracted upon the credit of private property, and joint debts upon the credit of joint property; but this is by no means always the case; nor is it so generally the case as to render it proper to make it the foundation of a general rule of equity. The exact truth in this particular can not well be known in most cases; and courts of justice have no right to speculate on a possibility, and make it the basis of their judgment. We know that the creditor usually gives credit upon considering the whole property and all the responsibilities of his debtors, whether as a partner or an individual; and this is all the court is interested to know. And although joint debtors have rights between themselves, which protect the interest of one of them in the partnership property from the private debts of the other, worked out by holding joint property to be first liable for joint debts, this is a different case; and therefore the rule is not necessarily to be reciprocally applied.

Nor is it easy to comprehend how it can be any longer held by enlightened judges, that the creditor of a partnership can not, upon the death of one of the partners, look directly to his estate for payment, since it is perfectly established that the debt is several as well as joint.

Mr. Collyer, in his work on partnership, 2d ed., p. 623, while admitting that the cases show the rule to be as claimed by the appellant, says: "If this point were decided on principle alone, and without reference to any supposed analogy between the practice in the court of equity and the practice in bankruptcy, it seems clear that the partnership creditor, as resting on his separate contract, would have a right to come in competition with the separate creditors."

Lord Hardwicke's rule has received but little favor or countenance in this country. In *Bell v. Newman*, 5 Serg. & R. 78,

Tilghman, C. J., in giving the opinion of the court, after discussing the subject at length, and reviewing the cases in the English chancery, rejects the present practice of the English courts. In *Allen v. Wells*, 22 Pick. 450 [33 Am. Dec. 757], there is a like review and a like conclusion come to by the court. Judge Story, in his treatise on partnership, section 377, says: "This rule [the present English rule], although now fairly established, has occasioned much diversity of opinion among learned judges at different times. It was established at an early period; but was afterwards departed from, and was again re-established; and it now stands as much, if not more, upon the general ground of authority, and the maxim *stare decisis*, than upon the ground of any equitable reasoning; in truth, it is precisely such a case as may well justify a great deal of argument on each side; and although it has been said that the equity of this mode of distribution is very plain, because each estate ought to bear its own debts, yet it is by no means clear that this is not an artificial suggestion, cutting down the difficulty and assuming the correctness of the rule, rather than showing it had its origin and foundation in the principles of natural justice *ex æquo et bono*." In his *Equity*, vol. 1, sec. 676, he says: "A broader principle is now established, and it is held that insolvency or bankruptcy is not necessary in order to justify the creditors of the partnership in resorting to the assets of the deceased partner; and that such creditors may, in the first instance, proceed against the executor or administrator of the deceased partner, leaving him to his remedy over against the surviving partners."

We will here add, that this last suggestion relieves the case from any real or supposed hardship. If the estate of the deceased partner ought not, as to the survivor, to pay the debt, but the survivor only, and he has ample property, let the estate pay as if it were a several debt; and then the executor may sue the survivor and get a settlement of the company accounts. If the estate should be found liable after all, as to the survivor, to pay the debt, the presentation and allowance of it by commissioners is the only remedy to accomplish this result. This would have been the case if both partners were alive; and the death of neither can make a difference, in a case presented to commissioners.

There are many cases in the books, as *Lawrence v. Trustees etc.*, 2 Denio, 577; *Bradley v. Burwell*, 3 Id. 61; *Pendleton v. Phelps*, 4 Day, 476; *Alsop v. Mather*, 8 Conn. 585 [21 Am. Dec.

703]; *Sturges v. Beach*, 1 Id. 508, where it is still held that a suit in chancery will not lie to recover a partnership debt out of the assets of the deceased partner, unless the survivor is proved to be insolvent.

Now, without saying how much this rule is to be qualified by the more recent principle of equity well established, that partnership debts are in equity several as well as joint, the objection grows altogether out of the mode of proceeding to enforce judgment, and not out of the nature or individuality of the debt. At law, the survivor only can be sued on a joint promise; and if the survivor is able to pay the debt, there is no necessity, and therefore there is no right, to go into a court of equity; and hence the rule above mentioned. No such technical or jurisdictional objection applies to this case; for here the claim is simply presented to a board of commissioners, the only tribunal which can adjudicate claims upon insolvent estates; and they must allow it if it is just and right.

Again, it has been urged that if joint creditors can come upon the private property of an insolvent debtor, *pari passu*, with private creditors, then if we do not allow the rule to work conversely, and permit private creditors to come in upon company property *pari passu* with company creditors, we give joint creditors an advantage over private creditors. This is so; but it is no other advantage than what appertains to a creditor having two securities over another creditor who has but one. If, because through the equities of a deceased partner, joint creditors have a prior lien on the company property, or in other words, if a partner can not himself appropriate company property to pay his private debts, to the injury of his copartner, and has no other private interest which can be taken by execution or otherwise in the property than what remains upon a settlement of partnership accounts, the inequality or advantage does not grow out of an unequal application of a rule of equity, but out of the nature of the debt and property in question. In England, it may be true, and we believe it is, that under their bankruptcy law, creditors who prove their debts must put themselves upon an entire equality with other creditors.

In Cull. B. L. 145-147, it is said that a creditor shall not be allowed to prove his debt, unless he swears he has no security, or offers to give up what he has. But this is no rule of equity, nor of fairness even; for we well know, and such is the practice, that if a creditor, by originally taking security for his debt, or by acquiring it afterwards by extraordinary diligence,

secures to himself the means of paying part of his debt, he is not thereby prevented standing upon an equality with others, for the payment of the remainder. Estates are perpetually settled upon this principle; and have been, from the earliest periods of our history. In *Findlay v. Hoemer*, 2 Conn. 352, this exact question was made and decided; and the court held, that a creditor might pursue all his remedies until he was paid in full; and that until then, he could not be marshaled out of any of his securities, or defeated in any of the remedies which were opened to others, to collect their debts.

Upon full consideration, we decide, that the rule adopted by Lord Thurlow is the true and just one, to wit—that the debts of a partnership are in equity joint and several; and that partnership debts, where one of the partners is dead, may at once be presented against his estate, though the survivor be solvent and within the jurisdiction of our courts.

We advise that the decree of the court of probate be not reversed.

In this opinion CHURCH, C. J., and STORES and HUNMAN, JJ., concurred.

WATTE, J., delivered a dissenting opinion.

Decree of probate affirmed.

PARTNERSHIP DEBTS ARE JOINT AND SEVERAL in equity: *McLain v. Carson's Ex'r*, 37 Am. Dec. 777; *Ladd v. Griswold*, 46 Id. 443, and notes. The principal case is cited to the same point, *per* Foster, J., dissenting, in *Olmstead v. Olmstead*, 38 Conn. 228.

PARTNERSHIP CREDITOR'S RIGHT TO PROCEED AGAINST ESTATE OF DECEASED PARTNER in equity or to prove his claim under the statute against such estate, though the surviving partner is solvent: See *McLain v. Carson's Ex'r*, 37 Am. Dec. 777; *Ladd v. Griswold*, 46 Id. 443, holding similar doctrine to the principal case. The case is approved on this point in *Lewis v. United States*, 14 Nat. Bank. Reg. 69, and in *Olmstead v. Olmstead*, 38 Conn. 328, *per* Foster, J., dissenting. It is cited to the same point in *Troy etc. Factory v. Winslow*, 11 Blatchf. 517; S. C., 1 Bann. & Ard. Pat. Cas. 102; but while it is there admitted that partnership debts may be allowed against the estate of a deceased partner without showing the survivor to be insolvent, where the statute requires the presentation of claims within a limited time, it is held that no suit at law or in equity is maintainable against the representatives of the decedent if the survivors are solvent and the firm assets are sufficient to pay the debts. In the case of *In re Rice*, 9 Nat. Bank. Reg. 373, it is held, citing the principal case, that where a partner sells his interest to his copartner, the copartner agreeing to pay the debts, and the latter becomes bankrupt, the joint creditors and his separate creditors share *pro rata* in his estate, without showing that the joint creditors have exhausted their remedy against the retiring partner. That all property and liabilities of a partnership devolve

upon the survivor at law where the firm is dissolved by death, see *Jones v. Hardesty*, 32 Am. Dec. 180; *Kinsler v. McCants*, 53 Id. 711.

RESPECTIVE RIGHTS OF PARTNERSHIP AND SEPARATE CREDITORS as to priority of payment out of joint and separate estate: See *Ladd v. Griswold*, 46 Am. Dec. 443; *Buchan v. Sumner*, 47 Id. 305; *Kirby v. Schoonmaker*, 49 Id. 160; *Rice v. Barnard*, 50 Id. 54, and cases cited in the notes thereto. See also *Allen v. Center Valley Co.*, *infra*. In *Davis v. Howell*, 33 N. J. Eq. 74, the principal case is cited as repudiating the doctrine that separate creditors of a partner have any right to priority of payment out of his separate estate over firm creditors, but that doctrine is there upheld on the authority of *Wilder v. Keeler*, 23 Am. Dec. 781, and other cases. The case is cited on the same point in *Vail's Appeal*, 37 Conn. 193.

ALLEN v. CENTER VALLEY Co.

[21 CONNECTICUT, 180.]

PARTNERSHIP CREDITORS HAVE NO SPECIFIC LIEN UPON FIRM ASSETS for the payment of their claims, either legal or equitable.

PARTNERS HAVE LIEN ON JOINT FUNDS FOR PAYMENT OF JOINT DEBTS of the firm, by means of which the right of the joint creditors to priority of payment out of partnership assets are worked out.

GOING FIRM MAY MAKE BONA FIDE DISTRIBUTION of the partnership funds among its members, or change them from joint to separate estate.

BONA FIDE TRANSFER BY GOING PARTNERSHIP OF FIRM PROPERTY to a corporation taking in payment stock of the corporation to be held by the partners individually, not made in contemplation of insolvency or to defeat creditors, can not be impeached by partnership creditors on a bill filed against the corporation and attaching creditors of the individual partners, nor have the joint creditors any priority over separate creditors with respect to the stock received by the partners in payment, although the assets at the time of the transfer were barely equal to the joint debts.

BILL filed by the plaintiffs as creditors of the firm of Hodges & Sage for a discovery and an injunction against certain proceedings at law. The case was reserved for the opinion of this court. It appeared that before September 1, 1849, the said firm, while still engaged in the pursuit of its business, sold and conveyed to the defendant corporation, *bona fide*, a certain steam-engine and other property of considerable value, taking in payment sundry shares of the stock in said corporation, which were transferred to each of the partners as their individual property. The assets of the firm were at the time of the transfer no more than sufficient to pay the firm debts, but this was not known to the corporation or its members, and the firm became openly insolvent on September 11, 1849. On that day and the day after, Joseph H. Sage, defendant, attached certain

assets of the firm to secure debts of the firm due him, received from one of the partners, in part payment of a separate debt of such partner, a transfer of his shares in the corporation, and attached the shares of the other partner for a separate debt due from him; and another separate creditor of one of the partners on the said eleventh of September took a mortgage from him of the said engine, etc., and the land on which it was. The plaintiffs, creditors of the firm before September 1st, attached on September 19th all the property of the firm, including the engine, etc., and also the corporate stock of each of the partners. They afterwards filed this bill.

J. H. Hubbard and C. Whittlesey, for the plaintiffs.

Seymour and H. Goodwin, for the defendants.

By Court, CHURCH, C. J. These plaintiffs have similar interests, but not a joint one, in the object of their application. The controversy here is between the plaintiffs as copartnership creditors of the firm of Hodges & Sage and the defendants as the separate creditors of or claimants under Hodges & Sage individually. The plaintiffs go especially for the steam-engine, boiler, etc., which were confessedly joint copartnership estate when their debts were contracted, and prior to the sale and delivery of them to the Center Valley Company; or they claim the stock which was the avails thereof, notwithstanding the manner in which it was subscribed for and taken. The claim of the plaintiffs is based upon what they supposed to be the true doctrine of courts of equity on this subject—that the creditors of a copartnership have a lien or such an equitable claim upon its assets that upon its insolvency they can make them applicable to the payment of their joint debts in preference to any claims which the separate and individual creditors of the respective copartners can make to them.

There certainly is very strong language found in the books in support of this general claim of the plaintiffs. Thus it is said, in *Brewster v. Hammet*, 4 Conn. 540, that “the equitable property in the goods attached is vested in the creditors of the copartnership;” and in *Witter v. Richards*, 10 Id. 37, the court says, “that the partnership creditors generally have a right to the partnership effects, in preference to the creditors of an individual partner, has not been disputed.” And in *Filley v. Phelps*, 18 Id. 296, the doctrine is declared to be, “that partnership debts are to be paid out of partnership funds in preference to debts against any individual member of the company.”

In the case of *Burtus v. Tisdall*, 4 Barb. 588, Strong, J., says: "It is clearly settled that the joint creditors have then the first equitable claim upon the whole for the satisfaction of their debts." Sometimes the copartnership property is called a trust fund for the benefit of creditors, and sometimes it has been said that the copartnership creditors have a lien, or a *quasi* lien, upon it. But whatever may be the exact nature and extent of their rights, we think it certain that they have at least a claim of priority of payment out of the joint funds so long as they continue to be joint: 2 Story Eq. Jur., sec. 1253.

That copartnership creditors have no specific lien, legal or equitable, *a priori*, upon the joint funds, we consider to be well settled; no more than any individual creditor has a lien upon the private estate of his debtor. In either case the lien is created by the levy of the writ of attachment or of execution upon the property of the debtor. The partners have the lien, and especially the solvent ones, and have a right to insist that the joint funds shall pay the joint debts, and in this way and by enforcing the equities or lien of the partners, the creditors of the copartnership come to their rights, whatever they are, and thus these rights are worked out, as the authorities say. This has been the received doctrine on this subject ever since the case of *Ex parte Ruffin*, 6 Ves. 119, decided by Lord Eldon in 1801: *Campbell v. Mullett*, 2 Swans. 551; Bissett on Part. 106; Gow on Part. 296; Collyer on Part. 337; Story on Part., sec. 326; 2 Story Eq. Jur., sec. 1253. If, therefore, the partners have the lien, the creditors can not have it.

As the plaintiffs had no specific lien on the steam-engine, etc., on the first day of September, 1849, when it was sold and delivered to the Center Valley Company, their attachments not having been levied until several weeks after this, why are not this sale and its consequences to be approved and sustained? The plaintiffs say, because at that time Hodges & Sage were, in fact, insolvent, and had no right to withdraw the company assets from the reach of the copartnership creditors, and convert the avails into separate estate to the prejudice of the joint creditors, as they have done, by the sale of the joint property, and by their separate and individual subscriptions for the stock received in payment. If this had been done fraudulently, in contemplation of actual and open insolvency, and with a design to defeat the claims of the plaintiffs or other copartnership creditors, and with the knowledge and assent of the Center Valley Company, or these defendants, this claim of the plaintiffs could not be

resisted: it would be sustained by the general and conservative principle, that the fraud of the parties would have destroyed the legality of the sale.

But here no fraud is proved. It is found only that at the time of the sale the company assets did not exceed in value the amount of the company liabilities; but Hodges & Sage were prosecuting their business in the usual manner, and perhaps without a knowledge of their exact condition; and as in other cases of declared insolvency, which have been preceded by a length of time, and sometimes by years, wherein a comparison of assets with liabilities would show an insolvent condition. And whatever Hodges & Sage might have suspected or even known, it is not found that these defendants had any knowledge of their pecuniary state: they knew only that when the steam-engine, etc., was purchased, it was copartnership property.

While the business of a copartnership is going on, and no dissolution by death, bankruptcy, insolvency, etc., requiring the marshaling of assets, there is no legal objection to a *bona fide* distribution of the copartnership funds among the members of the firm, or a change of them from joint to separate estate. Indeed, it is the purpose of all business operations, whether copartnership transactions or otherwise, to benefit individuals. And copartners always act for the ultimate advantage of themselves individually, and with the intent that the property and its avails shall, at some day, become separate estate.

The leading case of *Ex parte Ruffin*, 6 Ves. 119, before cited, fully recognizes the right of copartners to convert joint into separate property, even to the very time and by the very act of dissolution. Lord Eldon says: "Therefore a *bona fide* transmutation of the property is understood to be the act of men acting fairly, winding up the concern, and binds the creditors." And again: "To say this seems to me a monstrous proposition, that which, at any time during the partnership, has been part of the partnership effects, shall, in all future time, remain part of the partnership effects, notwithstanding a *bona fide* act." Considerations of public policy were strongly urged by Sir Samuel Romilly in that case, in opposition to this view of the lord chancellor; but he resisted them, and expressed the opinion, that a contrary doctrine would, in the absence of fraud, put a stop to all commercial transactions. Bissett, a respectable writer on the law of partnership, says, in view of all the authorities on the subject, "that notwithstanding the rights of the

joint creditors, the partners may convert the joint property into separate property; for having no lien on the property, the joint creditors, when notice of dissolution is given, can not prevent the partners from effectually transferring it, by *bona fide* alienation," etc. And again he says: "The partners may, during the partnership, convert joint into separate property, or separate into joint, and the property will, at the dissolution, be held to possess that character which is then impressed upon it:" Bissett on Part. 108, 111; Gow on Part. 296; Collyer on Part. 334, 511; Story on Part. 527; *Kimball v. Thompson*, 13 Met. 283.

Let these principles be applied here. Hodges & Sage, about the first day of September, 1849, while pursuing the copartnership business, sold and delivered to the Center Valley Company the steam-engine, boiler, etc., in question, and received in payment the stock of the company as separate estate, which has since been transferred to and attached by Josiah H. Sage, a separate creditor; and all this some time before the actual failure and open insolvency of the copartners, and several weeks before the plaintiffs had any pretense of lien upon it by their attachments.

It must follow, we think, that there was no trust attached to this property in the hands of these defendants. To hold otherwise would defeat the operation of the principles we have recognized, and be equivalent to the doctrine, that what has been must ever be copartnership property until all joint debts are paid, and thus obstruct ordinary copartnership dealings.

Had fraud been proved, and the rights of these creditors recognized, a further question suggested in the argument would have claimed more of our attention—whether these plaintiffs, as copartnership creditors, could have enforced their prior rights in this way. The language of the books is, that the rights and equities of the joint creditors are to be worked out only through the lien or equities of the partners.

That this is generally true we admit; and especially where there is to be a settlement of a partnership concern, either by the partners themselves or by a solvent partner, or a surviving one, or by an administrator, assignee, or receiver, etc. But there are cases of a different character, and this is one of them; and so were the cases of *Brewster v. Hammet*, 4 Conn. 540, and *Witter v. Richards*, 10 Id. 37. Here the partners, Hodges and Sage, are both insolvent, and take no interest in the settlement of their former business, but leave the creditors of the copartnership to take care of themselves; and here have been no proceedings,

by anybody, in the way of making distribution or marshaling assets. In the case of *Brewster v. Hammet*, this court refused to take the copartnership effects out of the hands of a separate attaching creditor and place them back again into the hands of insolvent partners, because that would defeat the rights of joint creditors; and in such a case, it was supposed that the copartnership creditors had an equitable property in the goods attached by a separate creditor, which they could themselves enforce, independently of the insolvent partners. And in the case of *Witter v. Richards* the court recognized and enforced the preferable claim of copartnership creditors to the joint effects against a prior attaching creditor of one of the copartners upon their own application, where both partners were insolvent. In such cases of insolvency it may well be said, we think, that the joint effects then remaining may be treated as a trust fund for joint creditors, who will be substituted in equity to the rights of the partners, and be permitted to pursue the proper remedies to enforce their prior rights, as was done in the above-cited case of *Witter v. Richards*, 10 Id. 37; 2 Story Eq. Jur. 500, sec. 1253. But, as we have seen, the facts of this case do not call for the application of such a principle, inasmuch as the plaintiffs have not clearly established a prior or preferable right: so that we must advise that their bill be dismissed.

In this opinion the other judges concurred.

Bill dismissed.

RIGHT OF PARTNERSHIP CREDITORS TO PRIORITY of payment out of partnership assets: See the cases cited in the note to *Camp v. Grant*, ante, 321. In *Harmon v. Clark*, 13 Gray, 121, and *California Furniture Co. v. Halsey*, 54 Cal. 318, the principal case is cited to the point that in case of insolvency, creditors have such right of priority, to be worked out through the lien of the partners *inter sese*. But while the partnership is still going on, the joint creditors have no lien to prevent the transmutation of joint into separate property, in good faith, and the estate is not then specifically subject to the payment of the joint debts: *Beecher v. Stevens*, 43 Conn. 592. Thus one partner may retire and transfer all his interest in good faith to his copartner when the property becomes separate and there is no lien thereon in favor of the joint creditors: *Dimon v. Hazard*, 32 N. Y. 65, 79, citing the principal case. In *Howe v. Lawrence*, 9 Cush. 556, it is held that the *bona fides* of the transaction is the only test by which to determine the right of joint creditors of a firm to have assets transferred to an individual partner upon dissolution applied to their debts, and that if such transfer is made *bona fide* for a valuable consideration, the property becomes separate estate not subject to claims of firm creditors, citing *Allen v. Center Valley Co.* and other cases. But where partners individually transfer their shares to other persons, there having been no distribution between the partners, and no transfer by the joint act of all or by one in the name of all, and no creditors of the new firm assert any

claim, it is held, in *Menagh v. Whitwell*, 52 N. Y. 171, that, so long as the property continues, the joint creditors may assert their priority as against creditors and transferees of the individual partners. As an illustration of the general power of a going partnership, or members thereof, to make arrangements and contracts which may be beneficial to their interests, *Allen v. Center Valley Co.* is referred to in *Davis v. Dodge*, 30 Mich. 270, where it is held, that an agreement or understanding between two firms, assented to by their respective firms, that accounts of individual members of either firm with the other are to be treated as firm accounts, is valid and may be enforced where no creditor of either firm or of any partner objects.

CASES
IN THE
SUPREME COURT
OF
FLORIDA.

ST. ANDREW'S BAY LAND COMPANY v. MITCHELL.

[4 FLORIDA, 192.]

ACTION OF COVENANT IS PROPER REMEDY for all breaches of contract under seal.

PARTIES TO CONTRACT ARE LIABLE according to the form in which they respectively execute the contract. One party may be liable in *assumpsit*, while the other is liable in covenant.

FORM OF ACTION AGAINST CORPORATION is not determined by the form in which the agent contracts.

WHETHER AGENT OF CORPORATION IS APPOINTED BY OFFICIAL ACT under the corporate seal or by a mere resolution of the directors is immaterial.

DEED PROFESSING TO HAVE BEEN MADE BY CORPORATION, signed and sealed by a committee of the same, will be presumed to be the deed of the corporation, when the latter ratifies and adopts the act by bringing suit against the other party for a breach of the contract.

IT IS NOT NECESSARY THAT CHARTER OF CORPORATION SHOULD CONFER POWER OF CONTRACTING BY AGENT or committee in order to give it that right, as all aggregate corporations from necessity must act and contract through and by means of agents.

WHEN MODE IS PRESCRIBED IN CHARTER or act of incorporation, in which the officers or agents of a corporation must act, that mode must be strictly pursued in order to render their acts or contracts obligatory on the corporation.

ACTION of covenant brought by plaintiffs against N. H. Mitchell upon an agreement, a copy of which is hereto appended.
“Territory of Florida, Washington county. This memorandum of an agreement made and entered into between the St. Andrew's Bay Land Company on the one part and Nicholas H. Mitchell of the other part, witnesseth: That the said company has this day leased to the said Mitchell, until the first day of

January, 1845, the block or square lying on St. Andrew's Bay, the houses and premises known as the hotel block, for and in consideration of one dollar, the receipt whereof is hereby acknowledged, and for the further consideration that the said Mitchell shall, as soon as he can, take possession of the premises, keep, or cause to be kept, until the said first day of January, 1845, an orderly and comfortable hotel, for the accommodation of such persons as may visit or move to said bay. The said company to finish the buildings, and the said Mitchell to furnish his own furniture and provisions, and other articles convenient for such an establishment, and to make such fencing and other arrangements as he may deem necessary, the said company furnishing the plank and nails that may be required. The said company further agrees that, at the expiration of the term of the lease, it will purchase from said Mitchell the furniture which may be in said house, at such price as may be fixed by two persons selected by the parties, one by each, and, in case of their disagreement, an umpire selected by them. The said Mitchell is to have the use of the house near said premises, known as Long's house, as a stable, until a stable shall be erected by the company. Signed, sealed, and delivered duplicates, this eleventh day of May, 1841. [Signed] The St. Andrew's Bay Land Company, by Richard H. Long [seal], Wm. Nickels [seal], A. H. Bush [seal], committee. N. H. Mitchell [seal]." The defendant demurred to the declaration, on the ground that the action did not lie. The demurrer was sustained, and plaintiffs appealed.

Keyes, for the plaintiffs.

Yonge and Woodward, for the defendant.

By Court, THOMPSON, J. The plaintiff in error, who was plaintiff in the court below, brought covenant against the defendant in error, on an agreement which was signed and sealed by Mitchell, but which was not sealed by the company, but was sealed by the committee who represented the corporation, with their private seals. On demurrer to the declaration, judgment was given for the defendant. At the foot of the demurrer the following point is stated, viz.: "That the form of action is misconceived herein, to wit, that the corporation, having contracted through a committee not authorized under its corporate seal, and thus not being liable in an action of covenant, the defendant is not liable in this form, but only in *assumpsit*."

It has been further urged in argument here, that there is

nothing to show that the St. Andrew's Bay Land Company made any agreement, the writing having been signed by certain persons as a committee, who do not allege that they were agents, or set forth their powers—that the charter confers no power on the company to contract by committee, and therefore the company is not bound, and the agreement is void for want of mutuality.

That the action of covenant is the remedy which the law assigns for all breaches of a contract under seal has been too long and too well settled to be doubted at this day, and there can be no reason to doubt the fact that the defendant in this case did both sign and seal the writing upon which the suit is founded—it is so alleged in the declaration, and admitted by the demurrer. But the position here seems to be that because the plaintiff may not be liable in this form of action for any breach of the contract on his part, the defendant is not—that the respective parties to a contract can only have their remedies against each other for breaches of the same contract in the same form of action. We do not so understand the law. The parties are liable according to the form in which they respectively execute the contract—it is not necessary that the form of the remedy should be the same. In *Sutherland v. Lishnan*, 3 Esp. 42, the plaintiff had sealed as well as signed the agreement, the defendant had not; the plaintiff brought his action in *assumpsit*, and Lord Eldon ruled, the objection that the action was misconceived having been taken, that the binding by deed ought to be mutual to make it necessary for the plaintiff to sue in covenant; the defendant, never having sealed the articles, could not be sued in that form of action, and *assumpsit* was rightly brought. In *Randall v. Van Vechten*, 19 Johns. 657 [10 Am. Dec. 193], Platt, J., says that the form of an action against a corporation is not determined by the form in which the agent contracts, though it is otherwise in the case of individuals. He says further: "Nor will it make any difference whether the agents for the corporation were appointed under the corporate seal, or by a resolution in the journals. It may legally be done in either mode; and whether it be in the one mode or the other can not vary the form of the action against the corporation."

The case of *Rose v. Poulton*, 2 Barn. & Adol. 822, is directly in point; the deed was intended to be executed in full by the respective parties, and there were mutual covenants; the plaintiffs, who had not signed and sealed the deed, brought their action of covenant, and it was sustained.

As to the second point, it seems that the fact that this action is brought by and in the name of the St. Andrew's Bay Land Company has escaped the attention of the counsel for defendant in error. The declaration alleges that the deed in question was signed and sealed by the defendant, and by him delivered to the company, and throughout treats the contract as made to and with the company—all which is admitted by the demurrer. The deed itself, of which profert is made, and which is filed with the declaration, states that it is a "memorandum of an agreement made and entered into between the St. Andrew's Bay Land Company on the one part and Nicholas H. Mitchell of the other part," and it is signed "The St. Andrew's Bay Land Company, by Richard H. Long, Wm. Nickels, A. H. Bush, committee." As also signed and sealed by the defendant.

Although it is signed and sealed by the committee, the deed professing to have been made by the corporation, the signatures of the committee will be presumed to have been made on its behalf, and this presumption will amount to full proof where, as in this case, the corporation ratifies and adopts the act by bringing suit against the other party for a breach of the contract, as upon a contract made with it. Nor do we consider it necessary that the committee, acting for the corporation, should state their authority to do so, and set forth whether it was by deed or otherwise. The defendant when the contract was entered into might have required the exhibition of the authority of the committee, or he might have waived such exhibition and have relied on the personal responsibility of the individuals composing the committee, in the event that they had assumed to act without sufficient warrant, and the corporation had refused to acknowledge their action. But we have here to do with the declaration, which alleges that the company made the contract, and which allegation is in due form, the facts being stated according to their legal effect. It was unnecessary to allege that the plaintiff entered into the contract by an agent: *Bank of Metropolis v. Guttschlick*, 14 Pet. 27.

The effect of the ruling, in *White v. Skinner*, 13 Johns. 307 [7 Am. Dec. 381], cited by counsel for defendant in error, is misapprehended. In that case, the defendant, who was director of a manufacturing company, was sought to be held personally liable on a contract which he had entered into, as director of the company, with the plaintiff. He pleaded in bar that he was one of the directors and an agent of the company, and had executed the agreement in that capacity, and not otherwise, of which the

plaintiff had notice. On demurrer to the plea, it was held that, to exonerate himself from the claim made upon him in his private, individual capacity, he was bound to aver and prove that he had authority to seal for his co-directors, and therefore the plea was bad, in not setting forth that he had such authority; that if he was not personally bound, he ought, by his plea, to have shown that, upon the covenant, the plaintiff had a right of action against some other person. The difference between this case and the point in support of which it is cited, is so obvious that further comment is deemed unnecessary. There is no doubt that if the committee acted without authority, the individuals composing it would be individually liable; but that question can not arise here, the company having adopted and ratified the act of the committee, and are here complaining of a breach of the contract by the other party thereto.

The remaining point to be considered is, that which alleges a want of power by the charter in the company to contract by a committee. All aggregate corporations from necessity must act and contract through and by means of agents, but we have never thought it of any importance by what name or description the agents were known and designated. The agent or agents employed may be called president, director, trustee, cashier, or secretary, or even a committee, without altering substantially their character as agents. Where the charter or act of incorporation prescribes the mode in which the officers or agents of a corporation must act, to render their acts or contracts obligatory on the corporation, that mode must be strictly pursued; but we do not understand from the charter of this company that there is any particular mode prescribed by which it is to contract within the limits of its authority, nor is there any particular officer designated whose sanction or signature is necessary to give validity to the act. In *The Bank of the Metropolis v. Guttschlick*, 14 Pet. 27, the agreement had been made by the president and cashier of the bank, and the objection was, that the act was not within the competency of those officers as such. The court says, "it was unquestionably in the power of the bank to give authority to its own officers to do so." From the charter of this company, we do not see any objection to the authorization of a committee to make the agreement in question for it. It might well be questioned whether this position, if well founded, properly comes up on this demurrer book, but we have considered it as if it was rightfully presented, and do not think it sufficient.

Upon the whole record, we are of opinion that the circuit court should have overruled the demurrer, the declaration and the matters therein set forth being clearly sufficient to enable the plaintiff to sustain the action, and, therefore, we order and adjudge that the judgment of the circuit court, sustaining the demurrer of defendant to plaintiff's declaration, be reversed and set aside, and the cause remanded to the circuit court of the western circuit, sitting in and for the county of Walton, with authority to said court, upon application of defendant, to give leave to answer over to said declaration, and for such other and further proceedings as may be necessary and proper in the premises.

Judgment reversed with costs.

ACTION FOR BREACH OF CONTRACT, FORM OF: See *Ross v. Milne*, 37 Am. Dec. 646; *Selma & T. R. R. Co. v. Tipton*, 39 Id. 344.

APPOINTMENT OF AGENTS OF CORPORATIONS.—The appointment of an agent of a corporation need not be made under its seal: *Garrison v. Combs*, 22 Am. Dec. 120. And a corporation may be bound by the record of its proceedings, without the annexation of a seal, when it acts through a board of directors and keeps a register of its acts: Id.

LIABILITY OF CORPORATION UPON CONTRACTS MADE BY ITS AUTHORIZED AGENTS.—A corporation is responsible for the acts of its agents done within the scope of its business and at its command: *Rabassa v. Orleans Nav. Co.*, 25 Am. Dec. 200; *Leggett v. N. J. M. & B. Co.*, 23 Id. 728; *Mott v. Hicks*, 13 Id. 550; *Garrison v. Combs*, 22 Id. 120.

CORPORATION ACTS THROUGH AGENTS.—A corporation can do no act except through the instrumentality of others: *Lyman v. White River Bridge Co.*, 16 Am. Dec. 705.

EFFECT OF APPROVAL BY CORPORATION OF UNAUTHORIZED ACTS OF ITS AGENTS.—A corporation may approve unauthorized acts of its agents, and make them its own, which approval may be either manifested by express acknowledgment or act, or inferred from circumstances: *Leggett v. N. J. M. & B. Co.*, 23 Am. Dec. 728; and approval by a corporation of the acts of one acting as its agent makes those acts as valid as though authorized in the first instance: *Everett v. United States*, 30 Id. 584; *Marlatt v. Levee S. C. P. Co.*, 29 Id. 468; *Baker v. Mechanics' Fire Ins. Co.*, 20 Id. 664; *Despatch Line v. Bellamy Mfg. Co.*, 37 Id. 203; *Elliott v. Abbott*, 37 Id. 227.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

MORROW ET AL. v. HANSON.

[9 GEORGIA, 398.]

WHERE THERE IS TOTAL FAILURE OF CONSIDERATION, and the defendant has derived no benefit from the contract, or none beyond the amount of money which he has already advanced, such total failure of consideration may be shown in bar of the action.

WHERE DEFENDANT PLEADS TOTAL FAILURE OF CONSIDERATION, and alleges a parol warranty of property for which a note was given, plaintiff can not avoid the defense by insisting upon the statute of limitations.

ASSUMPSIT brought by S. Hanson against R. E. and V. P. Morrow, to recover a balance due upon certain promissory notes made by the defendants. The latter pleaded want of consideration, to which plea plaintiff demurred, on the ground that the consideration was given by parol, and that as the period of four years had elapsed from the time of making the parol warranty (so-called consideration), the defense was barred by the statute of limitations.

W. W. Clark, for the plaintiffs.

J. Floyd, for the defendant.

By Court, **WARNER, J.** The only point in this case is, whether in a suit upon a promissory note by the plaintiff, the defendant may show, by way of defense, a warranty of the property for which the note was given, and that the consideration had totally failed, the warranty being by parol, and more than four years having elapsed from the time of making such parol warranty. The general rule of law is, that where there is a total failure of

the consideration, and the defendant has derived no benefit from the contract, or none beyond the amount of money which he had already advanced, such total failure of consideration may be shown in bar of the action: 2 Greenl. Ev., secs. 113, 136. So long as the plaintiff has the legal right to sue the defendant, he may defend himself by showing he has no cause of action against him. The note of the plaintiff imports a consideration on its face, but it is competent for the defendant to show, either that there was no consideration, or that the consideration for which it was given has totally failed; in other words, that the plaintiff has no cause of action against him; and it is not competent for the plaintiff to insist upon the statute of limitations, in order to avoid the defendant's defense, when he is seeking to enforce the contract against him. So long as the plaintiff has the legal right to sue on the contract, the defendant has the correlative right to defend it.

Let the judgment of the court below be reversed.

FAILURE OR WANT OF CONSIDERATION OF NOTE AS DEFENSE: See *Dickinson v. Hall*, 25 Am. Dec. 390, and note to same case, referring to other cases in this series. In *Parham v. Randolph*, 35 Id. 403, the court held that where facts are stated which amount to a fraud, it is not necessary that a bill should directly charge the fraud. This was a case where there was a partial failure of consideration of an entire contract for the purchase of land.

COKER v. BIRGE.

[9 GEORGIA, 425.]

NUISANCE IS ANYTHING THAT WORKETH HURT, INCONVENIENCE, OR DAMAGE TO ANOTHER.

IF ONE DO AN ACT OF ITSELF LAWFUL, which, being done in a particular place, necessarily tends to the damage of another's property, it is a nuisance.

TO CONSTITUTE NUISANCE, it is not necessary that a noxious trade or business should be carried on that will endanger the health of a neighborhood.

ERRECTION OF STABLE IN SUCH CLOSE PROXIMITY TO HOTEL as to work injury, inconvenience, prejudice, and damage to the proprietor of the hotel property will be deemed a nuisance.

INJUNCTION WILL LIE TO ABATE PRIVATE NUISANCE.

APPLICATION for an injunction, made by James Coker, asking that the defendant, William S. Birge, be restrained from erecting a stable near the property of the plaintiff. The facts are fully set forth in the opinion.

Alford and Moor, for the plaintiff.

McCune, for the defendant.

By Court, WARNER, J. This was an application to the chancellor for an injunction to restrain the defendant from erecting a livery stable, fronting Broadway street, in the city of Griffin, on the adjoining lot to the complainant's hotel, and within sixty-five feet thereof. The complainant had purchased the property expressly for a tavern, for which purpose it had been used since the year 1843, and was, at the time of the application for the injunction, in the use and occupation of the complainant as such; that the property is chiefly valuable from the fact of the hotel being erected on it, and being kept for that purpose; that the defendant purchased the adjoining lot, on which he is about to erect the livery stable, after the complainant purchased the hotel and went into the possession of the same—the object of the defendant in the erection of said stable, with a plank floor, being to keep and board horses therein. The complainant also expressly alleges in his bill, that if the defendant be permitted to complete the said stable, and appropriate it to the purpose designed and intended, that the injury to him and his family, as well as to his said property, will be irreparable; that it will result in the loss of health and comfort to the complainant and his family, in the loss of patronage to his hotel, and in a ruinous depreciation of the value of his property, in consequence of the unhealthy effluvia that will arise from the stable, the collection of swarms of flies, and the interminable stamping of horses therein. According to this statement of facts (which, for the purpose of obtaining the injunction, must be considered as true), is the complainant entitled to the relief which he seeks by his bill? The object of the bill is to restrain the defendant from erecting a nuisance on his own land. What is a nuisance?

Blackstone defines a nuisance to be anything that worketh hurt, inconvenience, or damage: 3 Bla. Com. 215. The same author defines a private nuisance to be anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another: *Id.* Speaking of nuisance to one's lands, the learned commentator, after enumerating several examples, says: "And by consequence it follows, that if one does any other act in itself lawful, which, being done in that place, necessarily tends to the damage of another's property, it is a nuisance; for it is incumbent on him to find some other place to do that act, where it will be less offensive." With respect to other corporeal hereditaments, he continues: "It is a nuisance to corrupt or poison a watercourse, by erecting a dye-house or a lime-pit, for the use

of trade, in the upper part of the stream; or, in short, to do any act that, in its consequences, must necessarily tend to the prejudice of one's neighbor. So closely does the law of England enforce that excellent rule of gospel morality, of doing to others as we would they should do unto ourselves:" *Id.* 218.

The maxim of the law is, *Sic utere tuo ut alienum non lædas*. The legal proposition, then, is, that if one do an act of itself lawful, which, being done in a particular place, necessarily tends to the damage of another's property, it is a nuisance; for it is incumbent on him to find some other place to do that act where it will not be injurious or offensive. Taking the allegations in the complainant's bill to be true, the erection of the livery stable by the defendant on the adjoining lot to his tavern property, and within sixty-five feet thereof, fronting one of the most public streets in the city of Griffin, with a plank floor therein, will result in a ruinous depreciation of the value of his property, the loss of health to his family, and in the loss of patronage to his hotel, in consequence of the unhealthy effluvia that will arise from the stable, the collection of swarms of flies, and the interminable stamping of horses.

The erection of the stable, then, in the particular place stated, will work hurt, inconvenience, prejudice, and damage to the complainant and his property, and is, therefore, in the eye of the law, a nuisance. To constitute a nuisance, it is not necessary that the noxious trade or business should endanger the health of the neighborhood. It is sufficient if it produces that which is offensive to the senses, and which renders the enjoyment of life and property uncomfortable: *Catlin v. Valentine*, 9 Paige, 576 [38 Am. Dec. 567].

But the court below appears to have been of the opinion that all these anticipated injuries were merely prophetic on the part of the complainant. The answer is, that the sworn allegations in the bill must be considered as a revelation of facts, so far as the judicial action of the court was concerned. Nor are we prepared to say, if we were at liberty to travel out of the record, that the injuries which the complainant expressly alleges will necessarily result to his property from the erection of the stable in the place stated, are at all improbable or unreasonable. If he had stood by and permitted the defendant to have erected his stable before making his application for relief, he would most probably have been too late, according to the ruling of this court in the *Water Lot Co. v. Bucks*, 5 Ga. 315. The allegations in the bill clearly make out a case of nuisance, in our judgment,

and the next question to be considered is, whether the complainant is entitled to relief in equity, or whether he has an adequate remedy at law. It is undoubtedly true, as urged on the argument, that it is not every case which will furnish a right of action against a party for a nuisance, which will authorize a court of equity to interfere by injunction. There must be such an injury as, from its nature, is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanent mischief, must occasion a constantly occurring grievance, which can not be otherwise prevented but by an injunction: 2 Story Eq. Jur. 204, sec. 925; *Attorney General v. Nichol*, 16 Ves. 341.

Is the injury here complained of such as from its continuance or permanent mischief must occasion a constantly occurring grievance? When the stable shall be erected it will be permanent—the nuisance will continue to exist, not only from day to day, but from year to year, and the injury resulting from it will be constantly occurring. How shall the complainant obtain adequate damages at law? Shall he be required to traverse the whole country to ascertain by the testimony of witnesses the number of customers kept away from his hotel by the offensive effluvia arising from the stable, or the interminable stamping of the horses kept therein, even if it were possible for him to do so? Customers stop at his hotel, and in consequence of the annoyance caused by the nuisance, they never return again, and by their report of it, in distant parts of the country, others are prevented from stopping there, and his business is ruined. Will it be said he has an adequate remedy at law to recover damages for this injury? To our minds, the difficulties which he would have to encounter in a court of law would be insurmountable, to say nothing of the multiplicity of suits which would necessarily have to be instituted. The bill makes just such a case, in our judgment, which, from the very nature of the injury, is not susceptible of being adequately compensated by damages in a court of law—it is a permanent, continuing mischief, which can not be effectually redressed but by an injunction. The injury is material, and operates daily to diminish the value of the complainant's property, and to diminish, if not wholly to destroy, the comfort of himself and family.

Let the injunction be granted, and the judgment of the court below reversed.

WHEN STABLE WILL BE CONSIDERED NUISANCE.—A stable will be considered a nuisance when it consists of a wooden building with a plank floor so

constructed that the stamping of the horses on it creates such a noise, day and night, that it can be heard, not only throughout the square on which it is situated, but on all the adjoining squares, and when it impairs the value of the houses in the vicinity as dwelling-houses: *Dargan v. Waddill*, 49 Am. Dec. 421. It also becomes a nuisance when the stench arising from the filth suffered to accumulate about it becomes so noisome as to inconvenience persons owning and occupying adjoining premises: *Id.*

NOXIOUS TRADE OR BUSINESS WAS A NUISANCE AT COMMON LAW, and it was unnecessary to show that any particular injury resulted from it: *Callin v. Valentine*, 38 Am. Dec. 567, and note; *Tanner v. Trustees of Albion*, 40 Id. 337; *Rung v. Shoneberger*, 26 Id. 95; *Mills v. Hall*, 24 Id. 160; *Gates v. Blincoe*, 26 Id. 440.

INJUNCTION AGAINST NUISANCE will be granted only where there is a strong and mischievous case of pressing necessity, and not because of a trifling discomfort or invasion of a legal right: *Rosser v. Randolph*, 31 Am. Dec. 712. An injunction to prevent a nuisance from being created or erected will be issued when it is shown that the same will tend to interfere or destroy the comfort of parties dwelling in the vicinity: *Bell v. Blount*, 15 Id. 524; *Lining v. Geddes*, 16 Id. 606; *Society v. Morris Canal Co.*, 21 Id. 41; *Scudder v. Trenton Delaware Falls Co.*, 23 Id. 756; *Lasala v. Holbrook*, 25 Id. 524; *State v. Mayor of Mobile*, 30 Id. 564; *Bigelow v. Hartford Bridge Co. et al.*, 36 Id. 502.

BEVERLY v. BURKE.

[9 GEORGIA, 440.]

REGISTRATION OF BOND FOR TITLE TO LAND does not entitle it to be received in evidence for any purpose without proof of its execution.

NO PROOF OF EXECUTION IS REQUIRED OF INSTRUMENT THIRTY YEARS OLD, when one party holds possession under it and the other party also claims possession under the same instrument.

COLOR OF TITLE IS WRITING professing to pass title, but which does not do it, either from a want of title in the person making it or from the defective conveyance that is used.

ENTRY UNDER COLOR OF TITLE IS SUFFICIENT TO CONSTITUTE ADVERSE HOLDING or possession.

TRUE OWNER OF PROPERTY MUST ENTER UPON POSSESSION of the same within the statutory period (seven years in Georgia), or his entry will be barred.

TRESPASSER WILL NOT BE PERMITTED to make the person trespassed against his debtor for improvements made without the consent and against the will of the latter; neither will the trespasser be allowed to set them off against damages to which he has subjected himself by reason of his trespass.

COURT HAS NO RIGHT TO ASSUME that parties to an action are trespassers, as that is a question of fact for the jury.

COPY OF DEED WHEN ESTABLISHED will be treated as the original for all purposes.

DEED CAN NOT BE READ IN EVIDENCE without proof of its execution; the same rule applies to a copy of a deed.

DEED RECORDED IN MINUTES OF COURT, in the course of proceedings instituted to establish the same, is not a registration contemplated by the law.

TITLE TO LAND MUST BE TRIED in the county where the land lies.

RULE OF PRACTICE REQUIRING TESTIMONY TAKEN BY COMMISSIONER to be communicated to the adverse party before the cause is called for trial is merely directory.

COURT IN CHARGING JURY HAS NO RIGHT to express or intimate his opinion as to what has or has not been proved during the trial.

ADVERSE POSSESSION IS QUESTION to be determined exclusively by the jury.

EJECTMENT. The facts are fully stated in the opinion.

Moore, and Latham and Stell, for the plaintiff.

Conner and Stone, and Doyal and Nolan, for the defendant.

By Court, LUMPKIN, J. This was an action of ejectment brought by John Burke against Joseph C. Beverly and William McBride, to recover a part of lot of land No. 67, in what was originally the ninth district of Fayette county. The plaintiff relied upon a statutory title.

He tendered in evidence a bond for titles from Henry Reeves to Thomas Steel, under which he claimed. Counsel for the defendant objected to the introduction of this paper without proof of its execution. The plaintiff relied on its registration, and the court admitted it to be read, as color of title.

There is no law authorizing this private writing to be recorded. The fact of registration does not entitle it, therefore, to be received in evidence for any purpose, without proof of its execution. Had this instrument been thirty years old, and testimony adduced that it had been acted upon, or that the obligee took possession of the premises in dispute under it; or had it been produced by the adverse party, pursuant to notice, the defendant also claiming an interest under it, no proof of its execution would have been required.

The plaintiff next offered in evidence a sheriff's deed to the land, to which the defendant's counsel objected, on two grounds:

1. Because the executions under which the property was sold, were not produced.

2. Because the deed conveyed the entire tract, part of which was situated in Campbell county, and a part in Fayette; and it was insisted that the sheriff of Campbell had no authority to sell land in Fayette.

The circuit judge admitted that the deed conveyed no title to the land in Fayette, but held that it was good to show color of title to the whole.

What is meant by color of title? It may be defined to be a writing, upon its face professing to pass title, but which does not do it, either from a want of title in the person making it, or from the defective conveyance that is used—a title that is imperfect, but not so obviously so that it would be apparent to one not skilled in the law.

The very fact of setting up a statutory title excludes the idea of a rightful or legal title. The length of the possession, and its nature and character, are the only tests.

In *Jackson v. Ellis*, 13 Johns. 120, the court said “that it had been repeatedly ruled that an entry under color of title is sufficient to constitute an adverse holding. It is not necessary for this purpose that the title under which such entry is made should be a good and valid title.” In *Clapp v. Bromagham*, 9 Cow. 530, Chancellor Jones says: “Though the title of an adverse possession be clearly defective, yet the true owner must enter within twenty years [in Georgia within seven], or he is barred his entry.” And in *Jackson v. Woodruff*, 1 Id. 276 [13 Am. Dec. 525], Woodworth, J., says: “If the title is bad, it is of no moment.” It is needless, I presume, to multiply authorities to this point. They all speak the same language, and fully sustain the decision of the circuit court.

Counsel for the defendant interrogated a witness (Holcomb) as to whether the buildings erected upon the land by the defendant were not worth as much or more than the rent. Plaintiff's counsel objected to the question, upon the ground that the defendants were trespassers, and as such were not allowed to set up the value of their improvements against the mesne profits. The court sustained the objection, and refused to permit the witness to testify.

Under certain circumstances it might be proper to allow proof as to improvements, even when made by acknowledged trespassers. If, for instance, the profits of the premises have been increased by repairs, it is proper for the jury to take into consideration these repairs, and to diminish the profits by them, but not below the amount which the premises would have been worth without such repairs. Beyond this, perhaps, it would not be proper to go in favor of trespassers; for it would be against all principle to allow a trespasser to make the person trespassed against his debtor for improvements made without his consent and against his will, or to suffer him to set them off against damages to which he has justly subjected himself by reason of his trespass. This would be worse than permitting him to set off one

trespass against another. It would be suffering him to justify or excuse one trespass by proving that he had committed another—for the act of improving is itself a trespass.

But the complaint in this exception is that the court, for the purpose of excluding Holcomb's testimony, assumed that the defendants were trespassers, a denial of which constituted the gist of their defense, and was certainly a question of fact to be submitted to the jury, under the direction and opinion of the court, as to the law which the evidence before them might involve: *Hyllon v. Brown*, 2 Wash. C. C. 165; *Myers v. Sanders*, 8 Dana, 65, 66.

The defendant's counsel offered in evidence the copy of a deed from Henry Reeves to Edmund Baughan, to the lot of land in controversy, which had been duly established in Fayette superior court, in lieu of the lost original, and recorded in Fayette superior court. This copy deed was rejected on the ground that the original deed not having been recorded in Fayette, it was necessary that the execution should be proven by the subscribing witnesses. There can be no doubt that when a copy deed is established, that it is to be treated as the original for all purposes whatsoever.

But here the original deed was never recorded in Fayette county. If produced, it could not be read in evidence, without proof of its execution. The copy, therefore, could be entitled to no greater privilege.

The fact that it was recorded in the minutes of Fayette superior court, in the course of the proceeding which was instituted for its establishment, did not dispense with the statutory requirement of being registered by the clerk of the superior court of Fayette county, in the book kept by him for the registration of deeds.

The defendant's counsel offered in evidence the exemplification of a suit in Campbell county, and of a judgment recovered thereon, for lot No. 67, in which John Burke, the plaintiff in the present action, was a co-defendant. The defendant did not claim that Burke could be estopped by this judgment of former recovery, as to so much of the land as was situated in Fayette county. He contended, however, that inasmuch as the title under which the recovery was had in Campbell county covered the entire lot, that it was notice to Burke of an adverse claim to the part in Fayette; but the court ruled out the testimony, and we think rightly.

By the constitution of this state, titles to land must be tried

where the land lies. The court in Campbell, then, had no jurisdiction over so much of lot No. 67 as lay in Fayette. The whole proceeding, as to that, was a nullity; and the exemplification of it was inadmissible, *ex suo vigore*, to prove notice or anything else. We will not say that the original papers might not have been produced, not as the pleadings in the cause, but as writings merely, and service of them proven by the officer, as an individual, for the purpose of charging Burke with notice of this adverse claim; but the record *per se*, or a copy of it, professes no inherent efficacy to effect this object, for want of jurisdiction in the court.

The defendant's counsel offered in evidence the answers of Hilliard Baughan to interrogatories, which were excluded by the court on the ground that they were not communicated to the opposite party before the cause was submitted to the jury.

The forty-seventh rule of the superior court provides "that all objections to the execution and return of interrogatories on appeal trials, the form of the commission or service of notice, must be made by the party seeking to avail himself of them before the cause has been submitted to the jury, or they will not be heard by the court, provided that the said interrogatories have been twenty-four hours in the clerk's office; and if they have remained in the possession of the party intending to use them, they shall be communicated to the adverse party before the cause is called for trial:" 2 Ga. 475.

What is the correct interpretation of the concluding clause of this rule? Can the party be considered in default under it, unless his interrogatories have been called for? And admitting that it was his duty voluntarily to tender them, does a forfeiture in this respect involve as a penalty the exclusion of the testimony? Such, we apprehend, could not have been the intention of the judges in framing this rule of practice. For if so, we respectfully submit that it would be in direct conflict with the statute authorizing testimony to be taken by commission; for the act declares that the examination of the witnesses, taken pursuant thereto, shall be heard on the trial of the cause on motion of either party: Prince, 425.

The construction, then, we put upon this rule is, that it is directory merely. It gives to parties the right to call for the exhibition of all the testimony taken by the commission before the cause is called for trial; and consequently makes it the duty of the court to compel its production. If this is not done from inadvertence or design, the party holding the interrogatories in

his possession, goes to trial at his peril—it being competent for the adverse party, when the interrogatories are offered during the progress of the trial, to take any exception to their execution or return, to the form of the commission, service of the notice, or any other defect. It remains only to dispose of the last exception.

The presiding judge charged the jury, “that the possession of the plaintiff was uninterrupted, continuous, notorious, sufficient, and adverse.”

All the authorities concur in holding that the question of adverse possession is not for the court to decide, but exclusively for the jury: *Graham v. Cammann*, 2 Cai. 168, 169; *Peaceable d. Hornblower v. Read*, 1 East, 568; *Bright v. Eynon*, 1 Burr. 397; *Dunlop v. Ball*, 2 Cranch, 184; *Jackson v. Wood*, 12 Johns. 242 [7 Am. Dec. 315]; *Springstein v. Schermerhorn*, Id. 357; *Frier v. Jackson d. Van Allen*, 8 Id. 495; *Jackson v. Murray*, 7 Id. 5; *Mayor of Kingston v. Horner*, 1 Cowp. 103; *Doe d. Fishar v. Prosser*, Id. 217; *Van Gorden v. Jackson*, 5 Johns. 467; *Jackson v. Striker*, 1 Johns. Cas. 289; *Jackson v. Woolsey*, 11 Johns. 446; 2 Bac. Abr. 529; *Foot v. Wiswall*, 14 Johns. 304, 307; *Jackson v. Joy*, 9 Id. 102; *Smith d. Teller v. Burtis*, Id. 174; *Smith d. Teller v. Lorillard*, 10 Id. 338; *Jackson v. McCall*, Id. 377, 380 [6 Am. Dec. 343]; *Jackson v. Pierce*, Id. 417; *Doe v. Campbell*, Id. 475; *Armstrong v. Toler*, 11 Wheat. 276; *Hinde v. Longworth*, Id. 199, 209; *Etting v. Bank of United States*, Id. 59, 75; *Brewton v. Cannon*, 1 Bay, 482; *Wallace v. Duffield*, 2 Serg. & R. 527 [7 Am. L. c. 660].

The act of the last legislature declares, “that from and after its passage, it shall not be lawful for any or either of the judges of the several superior courts of this state, in any court (meaning cause), whether civil or criminal, or in equity, during its progress, or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved, or as to the guilt of the accused.” And by the second section it is enacted: “That should any judge of said superior courts violate the provisions of the first section of the act, it shall be held by the supreme court for the correction of errors in this state, to be reversed, and a new trial granted in the court below, with such directions as they may lawfully make.” Pamph. L. 1849–50, 271, 272.

Upon this ground, then, we are left without discretion. The judgment must be reversed, and a new trial awarded.

I have forbore to discuss a point much mooted in the argu-

ment, as to what constitutes adverse possession. In *Conyers v. Kenan*, 4 Ga. 308 [48 Am. Dec. 226], some remarks were made as to how far or to what extent the occupant would be protected in his possessory title. I see no reason to modify the opinion there expressed.

No man in this country cultivates his whole tract of land. It is very unusual to inclose the whole. Good husbandry forbids that the whole should be planted. One possession is usually well defined by the boundaries of those which surround it, and frequent acts of ownership over the parts not cultivated or inclosed give notoriety to the possession of the whole. Nothing but want of due diligence and care, under such circumstances, can deprive the rightful owner of his property. Whether the log pen used occasionally for a grocery, on one side of this unsettled tract of land, with the fragments of old casks in it, constitutes such an adverse possession to the whole as to give effect to the statute of limitations, it would be premature at present to decide.

ANCIENT DEED MORE THAN THIRTY YEARS OLD may be read in evidence, without proof of its execution, if it be first shown that possession of part of the premises conveyed was taken and held under it, though such possession does not include the lands in controversy: *Jackson v. Davis*, 15 Am. Dec. 451.

COLOR OF TITLE, WHAT IS, AND NECESSITY OF TO SUPPORT ADVERSE POSSESSION: See note to *Watson v. Gregg*, 36 Am. Dec. 176, citing cases collected in this series.

ADVERSE POSSESSION, WHAT CONSTITUTES: See *Browning v. Estes*, 49 Am. Dec. 760; *Shanks v. Lancaster*, 50 Id. 108; *Webb v. Hynes*, Id. 515; *Alexander v. Walter*, Id. 688; *Stevenson v. McReary*, 51 Id. 102; *Wallace v. Maxwell*, Id. 380; *Inhabitants v. Benson*, 52 Id. 618, and notes.

COURT MAY DECLARE WHAT ADVERSE POSSESSION IS, but the facts constituting adverse possession are for the jury: *Macklot v. Dubreuil*, 43 Am. Dec. 550, and note.

JURISDICTION OF COURTS: See notes to *Morley v. Green*, 42 Am. Dec. 112, and *Bloom v. Burdick*, 37 Id. 299.

THE PRINCIPAL CASE IS CITED in *Gittens v. Lowry*, 15 Ga. 338, to the point that "color of title may be defined to be a writing, upon its face professing to pass title, but which does not do it, either from a want of title in the person making it or from the defective conveyance that is used—a title that is imperfect, but not so obviously so that it would not be apparent to one skilled in the law;" in *Griffith v. Wright*, 18 Id. 173, to the point that the granting of letters by a court having no jurisdiction over the property to be administered upon was a mere nullity; in *Hester v. Coats*, 22 Id. 56, to the point that the sheriff's deed alone, unaccompanied by either the judgment or the *f. fa.*, was sufficient to constitute color of title.

COX v. BAILEY.

[9 GEORGIA, 467.]

PROMISE TO PAY NOTE BY ONE OF THE JOINT AND SEVERAL MAKERS before the statute of limitations had operated as a bar takes the case out of the statute as to the other joint and several promisors.

ASSUMPSIT on a promissory note made by defendant Bailey and three others, due in one year from November 24, 1837. Defendant pleaded the statute of limitations. Plaintiff proved the payment of twenty-three hundred dollars on the note. Defendant moved for a nonsuit, on the ground "that payment by one joint obligor, even before the statute of limitations had run, did not prevent the statute from running in favor of his co-obligor." The motion was granted, and plaintiff appealed.

Glenn, for the plaintiff.

McCune, for the defendant.

By Court, **WARNER, J.** The only question made by the record in this case is, whether part payment of a promissory note made by one of four joint and several makers, or promisors, before the statute of limitations had barred the debt, will operate so as to prevent the bar of the statute as to the others. We have already held, that part payment of a debt is a sufficient acknowledgment that the whole debt is still due, so as to authorize the presumption of a promise to pay the remainder; but that is not the question now presented for our consideration. The question here is, whether part payment of a note by one of two or more joint and several obligors or promisors is a sufficient acknowledgment that the whole debt is still due, so as to authorize the presumption of a promise to pay the remainder by the other obligors or promisors. It may be stated as a general legal proposition, that the act of one copartner, in respect to the copartnership business, will be binding on the other copartners, for the reason that there exists a community of interest between them in relation to that particular business. In all such cases one partner is considered as the agent of the other partners. A partnership may be limited to one particular subject: *Willett v. Chambers*, 2 Cowp. 816, *per Lord Mansfield*. If two persons should draw a bill of exchange, they are considered as partners in respect to the bill so drawn, though in every other respect they remain distinct, and would not be permitted to deny that fact when the holder of the bill seeks to enforce its payment: *Carvic v. Vickery*, 2 Doug. 653, note. Is not the principle the

same when two or more jointly and severally engage to pay a specific sum of money, notwithstanding some of the parties may be sureties? Is there not a community of interest between the parties so contracting *quoad* that particular contract? There is undoubtedly a privity of interest between the parties, although some of them may be sureties, as it is said the defendant is in this case. In *Exall v. Partridge*, 8 T. R. 310, Lord Kenyon said: "Where one person is surety for another, and compellable to pay the whole debt, and he is called upon to pay, it is money paid to the use of the principal debtor, and may be recovered in an action against him for money paid, even though the surety did not pay the debt by the desire of the principal."

So in the case cited from Rolle's Abridgment, in *Childs v. Morley*, 8 T. R. 614, where a party met to dine at a tavern, and after dinner all but one of them went away without paying their quota of the reckoning, and that one paid for all the rest; and it was held that he might recover from the others their aliquot proportions. Upon what principle was the one who paid the whole bill entitled to recover from the others? Doubtless upon the principle that the parties had associated themselves together for the purpose of that particular transaction, and were jointly and severally liable to pay for the dinner, of which they all partook, as a special association of individuals, who were sureties for each other; there was a privity of interest between them in respect to that special undertaking, and the payment made by one, of the whole bill, was made for the benefit of all the others. Here the defendant, with three others, jointly and severally promised to pay the sum of money specified in the note. In respect to this contract they were jointly interested, and the holder of the note had the right to consider them as joint and several contractors, so far as its payment is concerned, as if they had been partners. There being a community of interest between them, in respect to this particular contract, the promise of one to pay it before the statute bar had attached, must be considered as the promise of all; upon the principle that each joint contractor, with respect to the joint contract, is to be considered as the agent of the others. The payment made by one, from which the promise is to be inferred, accrued to the benefit of all the other joint contractors. Can the other joint promisors derive a benefit from the payment made by one, and repudiate the act, when the legal consequences which result from such payment operate against them? Upon what legal principle can the defendant receive the benefit of the payment made by one of his

joint promisors, and not be bound by all the legal consequences which result from that payment? The defendant in effect says, that his co-promisor was his agent to make the payment on the note, and extinguish his liability to that extent; but when that act of his agent in making the payment is sought to be made to operate against him by preventing the bar of the statute of limitations, then it is he repudiates his agency.

The defendant in error cited on the argument: *Bell v. Morrison*, 1 Pet. 351; *Levy v. Cadet*, 17 Serg. & R. 126 [17 Am. Dec. 650]; *Bank of Exeter v. Sullivan*, 6 N. H. 124. In *Bell v. Morrison* and *Levy v. Cadet*, the promise was made after the dissolution of the copartnership. The *Bank of Exeter v. Sullivan* covers the point made by the plaintiff in error. In that case, as here, the promise was made before the statute had operated as a bar, but the great weight of authority, both in England and in the United States, is in opposition to the judgment of the court in the *Bank of Exeter v. Sullivan*. In *Whitcomb v. Whiting*, 2 Doug. 652, Lord Mansfield held that the payment by one is payment for all; the one acting virtually as agent for the rest. In *Parham v. Raynal*, 2 Bing. 306, Chief Justice Best elaborately considered the question, and sustained the judgment in *Whitcomb v. Whiting*, holding that case to rest on the same principle as decisions with respect to admissions by one of several persons jointly concerned in other instances; that an anomaly would be created by departing from it; that it had been confirmed in many cases, and not shaken by any authority. See also *Wyatt v. Hodson*, 8 Bing. 309; *Pease v. Hirst*, 10 Barn. & Cress. 122; *Burleigh v. Stott*, 8 Id. 36; *Smith v. Ludlow*, 6 Johns. 267; *Johnson v. Beardslee*, 15 Id. 3; *Beitz v. Fuller*, 1 McCord, 541 [10 Am. Dec. 693]; *White v. Hale*, 3 Pick. 291 [15 Am. Dec. 209]; *Sigourney v. Drury*, 14 Id. 387; *Dinsmore v. Dinsmore*, 21 Me. 433; *Shelton v. Cocke*, 3 Munf. 191; *Walton v. Robinson*, 5 Ired. L. 341; *Brewster v. Hardeman*, Dudley (Ga.), 150. The promise having been made by one of the joint and several promisors, before the statute had operated as a bar, we are of the opinion, both upon principle and authority, that it took the case out of the statute as to the other joint and several promisors; therefore, let the judgment of the court below be reversed.

STATUTE OF LIMITATIONS—REVIVAL OF DEBT BY ACKNOWLEDGMENT OF JOINT DEBTORS AND PARTNERS.—An acknowledgment by one of several makers of a joint and several promissory note takes it out of the statute of limitations as against the others: *Bound v. Lathrop*, 10 Am. Dec. 147; *White v. Hale*, 15 Id. 209; *Chardon v. Oliphant*, 6 Id. 575; *McDowell v. Goodwyn*,

12 Id. 685; *Frey v. Kirk*, 23 Id. 588; *Austin v. Bostwick*, 25 Id. 42; *Newlin v. Duncan*, Id. 66. In *Wheelock v. Doolittle*, 46 Id. 163, it was held that an acknowledgment by one partner operates against all to take a debt out of the statute of limitations, whether made before or after the dissolution of a copartnership, or before or after the statute has run upon the demand; see also the cases cited in the note to this case, as well as the notes to the preceding cases.

DUGAS v. MATHEWS.

[9 GEORGIA, 510.]

ASSIGNEE OF JUDGMENT MUST FIRST SHOW that he is entitled to control the judgment, before he can have a summons of garnishment issued thereon.

TRANSFEREE OF NEGOTIABLE NOTE upon which a judgment is founded, pending the suit thereon, acquires by the transfer such an interest or property in the judgment as will enable him to sue out and maintain a proceeding by garnishment.

INTELLIGIBLE WRITTEN EVIDENCE THAT JUDGMENT is the property of him who claims to be its assignee will be sufficient, in the absence of a formal deed of assignment, to enable him to sue out process of garnishment thereon.

SUMMONS of garnishment issued in the name of L. A. Dugas, against the Habersham Iron Works and Manufacturing Company, on a judgment obtained against them by L. F. E. Dugas, and transferred to and controlled by plaintiff. The summons was served on J. R. Mathews and R. Wyly, who answered, denying any indebtedness to the company. Upon the trial plaintiff offered in evidence the judgment obtained against the company in the name of L. F. E. Dugas, to which the defendants objected. The court sustained the objection, and plaintiff then offered in evidence a written assignment by L. F. E. Dugas of the original note of the company to the plaintiff, given while the note was in suit, and also a letter written by L. F. E. Dugas since the judgment was obtained, stating that he had transferred the judgment in the same suit to the plaintiff. This evidence was not admitted by the court, whereupon the plaintiff suffered a verdict, and excepted to the rulings of the court on the points stated.

Stanford, and Cobb and Hull, for the plaintiff.

J. W. H. Underwood, for the defendants.

By Court, NISBET, J. The exception taken upon the trial, to the admissibility of the evidence going to show the plaintiff's control of the judgment and execution, was not, in our judgment, too late. The argument against the exception being

within time is, that the garnishees having answered, and joined issue upon the truth of that answer, have admitted the plaintiff's right to summons them; that is, they have admitted that he, in this case, is the owner of the judgment upon which the summons issues. Further, it is said that the evidence is irrelevant to the issue, that being a single question, to wit: indebtedness or not, on the part of the garnishees, to the defendant in execution. It is true that this is the issue, and the plaintiff in garnishment holds the affirmative; but upon the trial of the issue, either at common law or on the appeal, he must first show himself rightfully in court. He must show that he is the creditor of the creditor of the garnishee. That is a part of his case. The answering of the garnishees does not admit that—indeed, it admits nothing. They are not estopped by answering to deny the plaintiff's ground of process against them. The control of the judgment was the foundation of the plaintiff's proceedings against the garnishees. It was incumbent on him to show it on the trial. Any exception, then, to the competency of the evidence to prove it was regular.

The next and only further question made in this record is, Did the court err in rejecting the evidence offered by the plaintiff to prove it? To determine this question, it is necessary to advert to the statutes which authorize garnishments, and to the state of the pleadings. By the act of 1822, it is made lawful for the plaintiff or his attorney to issue summons of garnishment in all cases pending in any court of the state, provided the plaintiff, his agent or attorney, shall make affidavit of the amount of the debt or demand which he believes to be due, and that he is apprehensive of the loss of the same, or some part thereof, unless such summons do issue. This affidavit is filed in the office of the clerk of the court where the suit is pending. By the act of 1834, the provisions of this act are extended to all cases, whether at law or in equity. By the act of 1822, garnishment issues in behalf of a plaintiff in a judgment, upon the oath of the plaintiff, his agent or attorney (in addition to the oath required in cases of suit pending as stated above), if required to make oath by the defendant, the garnishee, or the plaintiff or his attorney, in any younger judgment, that he believes the sum apparently due on the judgment and claimed by him is actually due, provided the proper officer shall enter on the execution issued on the judgment that there is no property to be found: Prince, 36, 37, 41.

Under these acts the proceedings in this case were instituted

upon the oath of Colonel Stanford, the attorney of the plaintiff in garnishment. His oath corresponds with the declaration in regular suits, and is the plaintiff's initiatory pleading. Strictness in pleading is not required under our garnishment laws. The plaintiff's case is regularly brought before the court if the oath contains all that the statutes require. This oath does contain the statutory requirements. It contains more, and more became necessary by reason of the peculiar features of this case. Colonel Stanford swears that he is the attorney at law of Lewis A. Dugas; that the Habersham Iron Works and Manufacturing Company (the defendants in the judgment) are, as he believes, justly indebted to Lewis A. Dugas in the sum of three thousand two hundred and forty-five dollars, upon a judgment obtained by Lewis F. E. Dugas against that company, and that Lewis A. Dugas has the legal control of that judgment. He further swears, that he believes the sum apparently due and claimed on the judgment is actually due to Lewis A. Dugas, and that he is apprehensive of the loss of the same, or some part thereof, unless summons of garnishment do issue. Upon this affidavit the summons issued. The garnishees appeared and answered, denying any indebtedness to the Habersham Iron Works and Manufacturing Company. The plaintiff traversed the answer, and the garnishees joined issue. This issue was on trial on the appeal, when the plaintiff tendered in evidence the judgment in favor of Lewis F. E. Dugas, which was objected to, upon the ground that it was a judgment in favor of a third person. The court ruled it out, until it was shown that the plaintiff in garnishment, Lewis A. Dugas, had the control of it. To show the control, he then tendered in evidence two papers—one a copy of the note upon which the judgment was founded, with the following indorsement thereon:

"I do hereby, for value received, which I hereby acknowledge, transfer to Lewis Alexander Dugas all my right, title, and interest to the notes now in suit by Dugas & Allen, plaintiff's attorneys, a full description of which is herein written out in full.

"[Signed]

LS. FRED. E. DUGAS.

"Augusta, December 27, 1841."

The note thus transferred was identified as the note upon which the judgment was founded, and upon which the suit was, at the time of the transfer, pending. It was a negotiable note, being payable to the order of Lewis F. E. Dugas, the assignor, and also the plaintiff in the suit then pending.

The other paper was in these words:

“ L. F. E. Dugas v. The Habersham Iron Works and Manufacturing Company.—*Fi. fa.* from the superior court of Habersham county, Georgia, and issued upon a judgment obtained April term, 1842.

“ To John R. Stanford, attorney at law: Having assigned the above judgment and execution to Lewis A. Dugas, you are authorized to use my name in any proceeding yourself or the said Lewis A. may deem necessary to the collection of said debt, and you are authorized to act as my attorney in any court proceeding instituted for the collection of the same, should you deem the use of my name necessary. June 17, 1846.

“ [Signed]

LS. FRED. E. DUGAS.”

Both of these papers were objected to, upon the ground that neither of them singly, nor both together, constituted such an assignment as is contemplated by our statute. The court sustained the objection, and thus we have the question as well as the *status* of the case when it was made.

For obvious reasons, I consider these papers separately, and, first, the assignment of the note. Did this paper give to the plaintiff in garnishment such a control over and property in the judgment as would authorize him to issue garnishment upon it? That is the question. If it did, the court erred in rejecting it. We consider that Lewis A. Dugas, the plaintiff in garnishment, acquired by the transfer of the note upon which the judgment is founded, pending the suit thereon, such an interest or property in the judgment as would enable him to sue out and maintain the proceeding by garnishment. The note being negotiable, he acquired a title to that by the transfer, and the right to control it in the hands of the attorneys who had instituted the suit. By the transfer of the note, the suit pending on it, he became the usee of the plaintiff; that is, the equitable owner of the interest in the suit. It is a legal inference from the transfer of the note, that the suit then pending should proceed for the use and benefit of the transferee. Such we consider the effect of the transfer. It would have been competent for him to have dismissed the suit, and sued on the note, in the name of the payee, for his use, by striking out the written transfer, if it had been transferred by the usual indorsement. The note itself showed no title out of the plaintiff in the action; nor was it competent for the defendant to question the plaintiff's title, unless it became necessary to sustain some equitable defense.

The judgment, therefore, is a valid, subsisting judgment, and

could not now be set aside for irregularity. The transfer of the note, then, placed him in the position of the usee of the action, and of the judgment when obtained. The record, it is true, of the judgment exhibits the plaintiff as the legal owner of the judgment, but the evidence shows that he holds the title to it for the use of the transferee. In equity he is the owner of the judgment; he is, as such, entitled to the money raised on it, and his receipt would be a protection to the defendants. We hold that an equitable ownership or title to the judgment is such a title as will authorize the suing out of garnishment. There can be no doubt but that the assignee in this case could, in a court of chancery, apply a debt due by the garnishees to the defendants in the judgment to that judgment, upon his claim, as holding the equitable title to it. If so, why go into chancery, if our statute gives him a remedy at law? The proceeding by garnishment is in the nature of and a substitute for a proceeding in chancery. Particularly is this position true in this state, where we have a statute which authorizes a party to proceed at law in all cases where he may conceive that the legal remedy will be sufficient. The only reply to this is the language of the statute, which simply authorizes the plaintiff, or his agent or attorney, to sue out a garnishment on the judgment. It will not do to put too literal a construction on it. For the purposes of this proceeding, and in the spirit of the act, the real owner of the judgment is the assignee. This construction would, before our statute, have denied to the transferee of a judgment, assignable at common law, the benefits of our garnishment laws. Our statute authorizing the assignment in writing of a judgment empowers the assignee to collect it in his own name, and, as I conceive, admits him to the remedy by garnishment. Before that statute the proceeding to collect was, no doubt, in the name of the plaintiff, for the use of the assignee. So we have held that the assignee of a dormant judgment may revive it by *scire facias*, in the name of the plaintiff, for his use: *Mayor etc. of Macon v. County Academy*, 7 Ga. 204. Here the title to the judgment, by the transfer of the note, is not set up under the statute, but under the common law. How, then, was the proceeding to be instituted? It could not be instituted by the plaintiff, L. F. E. Dugas, because he could not swear, as the statute requires, that anything was due to him on the judgment, for he had transferred his interest in it.

The only practicable course is that taken in this case. Here the proceeding is instituted in the name of the assignee—he

takes the oath (or rather his attorney)—he is the plaintiff in garnishment; but the fact of the transfer is developed in the record. It is stated in the oath, and the record brings before the court the whole transaction. The proof offered is in accordance with the pleadings. It sustains the allegations of the oath. The transfer of the note, therefore, we think ought to have been admitted, not as evidence of title to the judgment, under the act of 1829, but as evidence of an equitable title acquired, upon general principles, before the judgment was had. The garnishees certainly can not complain, for a judgment against them on this issue would be a protection against the plaintiff in the *fi fa.*, and against their creditors, the Habersham Iron Works and Manufacturing Company.

Independent of the transfer of the note, we think that the order to Colonel Stanford is a written assignment of the judgment, sufficient under the act of 1829. That act prescribes no form of assignment. No law makes necessary any formality in the transfer, of which I have any knowledge. It only requires that the transfer be by written assignment or control. That is all. It forbids all parol assignments, and makes written evidence of the transfer indispensable. Here is that evidence, under the hand of the only person that could make it, to wit, the plaintiff. It contains an acknowledgment that he has assigned this judgment to Lewis A. Dugas, and directs that his name should be used in all proceedings deemed necessary to enforce its collection. The assignment referred to as the acknowledgment is, no doubt, that of the note. This order to Colonel Stanford does not give effect to that, as a transfer of the judgment, but the acknowledgment, coupled with instructions to use his name in all proceedings necessary to collect it, and that for the benefit of Lewis A. Dugas, is a present transfer of that judgment. It is written evidence that he was not the owner of it, and that Lewis A. Dugas was the owner. We can not believe that the ends of justice can be subserved by requiring, under the act of 1829, a technically formal deed of assignment. What we do require is, that there be intelligible written evidence that the judgment is the property of him who claims to be its assignee. Such we consider this order to be.

Let the judgment be reversed.

ASSIGNMENT OF JUDGMENTS AT COMMON LAW.—The assignment of a judgment at common law did not authorize the assignee to bring an action thereon in his own name. The effect of an assignment was merely to transfer an equitable title. To all actions, therefore, having for their object the subject-

ing of property to the payment of judgments, the assignors were necessary parties as holders of the legal title. But the assignee, by virtue of his equitable interest, had the right to control the collection of the judgment, and for that purpose, to use the name of the plaintiff, his assignor, and to receive the money collected. The common-law inhibition preventing the direct assignment and transfer of the legal as well as of the equitable title to judgments is no doubt abolished in a majority of the states of this Union; and its place has been taken by statutes under which it is not merely the privilege, but also the duty, of the assignee to control and enforce the judgment in his own name: *Freeman on Judgments*, 3d ed., sec. 421, and cases there cited.

WHAT JUDGMENTS MAY BE ASSIGNED.—A judgment in favor of the state, when paid by a surety, can not be assigned to such surety by any officer or agent of the state: *Peacock v. Pembroke*, 8 Md. 348. A judgment is not assignable at law; but an officer may obey the commands of the holder of the equitable interest, and the court will protect him in it: *Millar v. Field*, 3 A. K. Marsh. 104. A verdict or judgment is not of itself negotiable: *Duncan v. Bloomstock*, 2 McCord, 318. But a contrary opinion was held in the case of *Weire v. City of Davenport*, 11 Iowa, 49. In passing upon this case the court said: "We entertain no doubt but that such a liability [meaning the judgment obtained against the city] may be sold or transferred if *bona fide*, so as to give the holder a priority over an attaching creditor of the transferrer. It may be sold just as a horse or any other property may be, and the title pass just as completely; and whether the transferee could sue in his own name or not, the vendor still could not deny his title, nor could the creditors of such vendor. There was an action pending at the time of this assignment, and the transfer related to and included the verdict and judgment as well as the mere cause of action. And this might be done in the absence of fraud, so as to give the assignee or vendee a good title to the judgment, and a right to control it as his own property:" *Robinson v. Weeks*, 6 How. Pr. 161; *Flynn v. H. R. R. Co.*, 6 Id. 308; *Hodgman v. Western R. R. Co.*, 7 Id. 492; *Purple v. H. R. R. Co.*, 4 Duer, 74; *People v. Tioga Common Pleas*, 19 Wend. 73; *McKee v. Judd*, 12 N. Y. 622; *Waldron v. Willard*, 17 Id. 446; *Haight v. Hoyt*, 19 Id. 464; *Sherman v. Elder*, 24 Id. 381; *Byxbie v. Wood*, Id. 607; *Whitney v. Slauson*, 30 Barb. 276; *Devlin v. Mayor*, 50 How. Pr. 1; *Hicks v. Cleveland*, 48 N. Y. 84; *Pulver v. Harris*, 52 Id. 73; *Wade v. Kallfleisch*, 15 Abb., N. S., 16. In *Comeggs v. Vasee*, 1 Pet. 213, Story, J., says: "It may be affirmed that vested rights *ad rem* and *in re*, possibilities coupled with an interest, and claims growing out of and adhering to property, may pass by assignment." An assignment of a judgment in an action in tort against a sheriff for malfeasance, where the tort is merged in the judgment prior to the assignment, is good, and the assignee may sue in his own name: *Charles v. Haskins*, 11 Iowa, 329; *Edmonds v. Montgomery*, 1 Id. 143; *Ford v. Stuart*, 19 Johns. 342; *Bridge v. Johnson*, 5 Wend. 342; *Prescott v. Hull*, 17 Johns. 284; *Kessel v. Albetis*, 56 Barb. 362; *Risley v. Phoenix Bank*, 11 Hun, 484.

ASSIGNMENT OF JUDGMENTS—FORM OF TRANSFER.—No formal deed of assignment is necessary. So long as it can be shown that there was a *bona fide* transfer, it seems to be the rule of the courts to ask for no other. In *Aylesworth v. Brown*, 10 Barb. 167, the court held that an assignment of a judgment was not rendered invalid by the omission of the middle letter of the assignor's name in the title of the suit and in the signature, nor by stating the amount of the judgment to be "seventy-five dollars besides costs," while the amount mentioned in the docket was "one hundred and twenty dollars damages and costs," nor because the assignment states that the judg-

ment was rendered in 1844, whereas it was not docketed till 1845: *People v. Fleming*, 2 N. Y. 484; *Ex parte Newell*, 4 Hill, 608; *Bank of Vergennes v. Warren*, 7 Id. 91; *Rice v. Davis*, 7 Lans. 400. An assignment of a judgment in the words, "For value received, I hereby transfer the entire control of the *fi. fa.* from the above-stated judgment and of the judgment above stated from this date to A. B. G.," is an unqualified transfer of the judgment: *Griffin v. Camack*, 36 Ala. 695.

MAY BE ASSIGNED BY PAROL.—A judgment may be transferred by parol: *Clark v. Moss*, 11 Ark. 736; *Weir v. Pennington*, Id. 745. It is not necessary to aver that the assignment was under seal: *Stoddard v. Benton*, 6 Col. 508. Equity will enforce the assignment when for a valuable consideration, whether it is in writing or by parol: *Brahan v. Ragland*, 3 Stew. 247; *Black v. Everett*, 5 Stew. & P. 60; *Haden v. Walker*, 5 Ala. 86; *Becton v. Ferguson*, 22 Id. 599; *Cravens v. Duncan*, 55 Ind. 347; *Prescott v. Hull*, 17 Johns. 28; *Ford v. Stuart*, 19 Id. 3; *Kessel v. Albetis*, 56 Barb. 47. And a part of the judgment may be assigned by parol: *Wood v. Wallace*, 24 Ind. 226.

VALIDITY AND EFFECT OF ASSIGNMENT.—A sale and transfer of real property, for which the vendor has recovered possession in an action for its recovery, will operate as an assignment of the judgment, and the purchaser may revive the judgment by *scire facias* in his own name: *Wright v. Parks*, 10 Iowa, 342. On the sale by one person of a judgment recovered by another, a warranty of title is implied, embracing also a warranty that the judgment is due and unpaid, where nothing is said on the subject. But a general warranty, whether express or implied, does not extend to a defect known to the purchaser: *Furniss v. Ferguson*, 34 N. Y. 485; *Janson v. Ball*, 6 Cow. 628; *Bennett v. Buchan*, 61 N. Y. 222. The relinquishment or assignment of a judgment releases or transfers the debt as well as the security: *Ellsworth v. Caldwell*, 18 Abb. Pr. 20. A judgment against a plaintiff, which had been obtained by a third party and assigned to the defendant before action brought, is admissible in discount: *Sexton v. Gee*, 1 Hill (S. C.), 378.

EFFECT OF ASSIGNMENT AS TO ASSIGNOR.—A simple assignment of a judgment does not render the assignor liable to refund the consideration, in case the judgment debtor fails to pay the amount: *Robinson v. White*, 4 Litt. 237. By the assignment of a judgment at law the assignor becomes a bare trustee, and as between him and the assignee has no right to receive satisfaction of the judgment: *Hewett v. Outland*, 2 Ired. Eq. 438.

EFFECT OF ASSIGNMENT AS TO ASSIGNEE.—The assignee of a judgment takes only his assignor's right as against the debtor, but is not affected by the latent equities of third parties: *Wright v. Levy*, 12 Cal. 257. The assignee of a judgment holds it subject to the same defenses as the assignor: *Rawson v. McJunkin*, 27 Ga. 432; *Scott v. Harkins*, 32 Id. 302; *McJilton v. Love*, 13 Ill. 486; *Hughes v. Trahern*, 64 Id. 48; *Robeson v. Roberts*, 20 Ind. 155; *Stout v. Vankirk*, 10 N. J. Eq. 78; *Filbut v. Hawk*, 8 Watts, 443; *Shelton v. Hurd*, 7 R. I. 403; *Burtis v. Cook*, 16 Iowa, 194; *Downer v. South Royalton Bank*, 39 Vt. 25; *Blakesly v. Johnson*, 13 Wis. 530; *Brisbin v. Newhall*, 5 Minn. 273; *Burson v. Blair*, 12 Ind. 371. If a judgment is assigned by its owner, and afterwards levied upon and sold as his property, the right of the assignee is prior to that of the purchaser at the sheriff's sale: *Fore v. Manlove*, 18 Cal. 436. Where a judgment has been fraudulently revived after satisfaction, an assignee of the judgment takes it at his peril, whatever the validity of a sale under execution on the judgment might be: *Troup v. Woods*, 4 Johns. Ch. 228. A judgment in favor of a corporation, if properly

assigned, may be enforced after the corporation has ceased: *Leach v. Thomas*, 27 Ill. 457. Where a judgment creditor assigns his judgment, which is founded on a mortgage note, and also another note, and the mortgage securing the two notes which he holds against the judgment debtor, his assignee is entitled to all the remedies for the collection of the note and judgment which might have been employed by the assignor: *Applegate v. Mason*, 13 Ind. 75. The assignee of a judgment with notice of a certain agreement relative to its enforcement, between the parties thereto, takes subject to that agreement, and can not set it aside for fraud of the defendant in obtaining it, whatever rights his assignor may have had: *Borst v. Baldwin*, 30 Barb. 180. The purchaser of a judgment from the judgment creditor in good faith, and without notice of equities between the latter and a third party interested, is not affected by such equities: *McCotter v. McCotter*, 16 Abb. Pr. 265. The assignment of a judgment bond on the record is constructive notice to all parties: *Eldred v. Hazlett*, 38 Pa. St. 16. The subsequent purchase of a judgment, accompanied or followed by a transfer upon the record, will pass title against a prior purchase not recorded, and of which the second purchaser was ignorant: *Campbell's Appeal*, 29 Id. 401.

WHEN ASSIGNMENT OF JUDGMENT OPERATES AS SATISFACTION.—If a debtor pay his judgment creditor a sum equal to the amount of the judgment, and thereby cause the judgment to be assigned as a payment to another of his creditors, the transaction does not discharge the judgment, but the same continues valid in the hands of the assignee: *Horok v. Kimball*, 2 Blackf. 309. *Noble v. Merrill*, 48 Me. 140, was a case where the question was raised whether an assignment of a portion of a judgment, by one of the creditors to a third person for a valuable consideration, was not a satisfaction of any part of the judgment, and the court held it was not. A judgment may be purchased, and the assignee sue upon it in the creditor's name; but where payment of the judgment is intended, it is satisfied, and the lien discharged: *Rollins v. Thompson*, 21 Me. 522.

BULLOCH v. THE STATE.

[10 GEORGIA, 47.]

IT IS IMPORTANT TO INQUIRE WHETHER PARTY ACCUSED OF CRIME had any motive to commit such crime.

FACT THAT ACCUSED PURCHASED NUMBER OF LOTTERY TICKETS before money was taken from a bank is admissible in evidence for the purpose of showing a motive for the taking.

DESCRIPTION IN INDICTMENT—GENERAL RULE.—Bank bills described as being of a particular denomination, issued by a certain bank, signed by the president and countersigned by the cashier of the bank, the same being the property of said bank, is a sufficient description to meet the requirements of the general rule which requires the description in an indictment to be sufficiently certain and precise to enable the accused to understand the general nature of the crime of which he is accused.

DEFENDANT CAN NOT BE ACCUSED OF TWO DISTINCT OFFENSES IN INDICTMENT, but the same offense, or the same species of offense, may be charged in different ways in order to meet the evidence.

DIFFERENT PUNISHMENTS WERE PROVIDED FOR CONVICTION UNDER TWO

AM. DEC. VOL. LIV—24

COUNTS OF INDICTMENT: *Held*, that upon a general verdict of guilty, the presumption of law was that a conviction of the greater crime was intended.

COMMENT UPON TESTIMONY—EXPRESSION OF OPINION.—Instruction to jury “that it was competent for them to look to circumstantial testimony, as, for instance, the acts and conduct of accused, to ascertain his guilt, such as his absconding and concealing himself for the purpose of escaping the laws, or his being possessed of or using large sums of money which he could not honestly account for,” does not amount to an expression of opinion as to the guilt or innocence of the accused.

ACCUSATION IN INDICTMENT AGAINST PRINCIPAL AND ACCESSARY, which commences and concludes in the manner provided by statute, amounts to but one count, and objection that each is separate and should have the statutory conclusion is not well taken.

APPEAL by plaintiff in error from judgment of Chatham superior court. The facts are stated in the opinion.

John E. Ward and John M. Berrien, for the plaintiff in error.

Law and Bartow, for the defendant.

By Court, WARNER, J. The plaintiff has assigned five distinct grounds of error to the judgment of the court below in this case, which we shall consider in the order the same appear in the record before us. The ground of error assigned is, that the court erred in admitting in evidence sundry lottery tickets contained in a package addressed to Maury & Company, with a note written by the defendant, directing the proceeds of the tickets to be remitted to his brother.

The objection urged to the admission of this evidence is, that it appears from the record, that these tickets were purchased anterior to the time the money is proved to have been taken from the bank, and therefore irrelevant testimony. It appears from the record, that the defendant was the cashier of the Central Railroad and Banking Company, and had the custody of the money and funds belonging to that institution; that on the second day of February, 1850, by his own showing, he had in his hands the sum of one hundred and twenty thousand dollars; that on or about the twenty-seventh of the same month there was one hundred and three thousand dollars taken from the bank, and the defendant absconded from the state about the same time to England, where he was arrested and brought back. It also appears that the defendant was embarrassed in his pecuniary matters previous to that time, saying it was difficult for him to get along with his private affairs, being pressed by a large judgment, and it was exceedingly difficult for him to live. After the defendant was brought back to Savannah,

he admitted to Mr. Cuyler, the president of the bank, that he had been dealing in lottery tickets, and commenced doing so the preceding fall; that his losses in February by lotteries could not have exceeded fifteen thousand dollars in that month. The defendant also stated that in December he drew two prizes in the lotteries amounting to twelve thousand dollars, and that money went to replace money which he had previously taken to purchase lottery tickets, and it made his money good at the end of the month.

There is no positive evidence that the defendant took the money from the bank; his guilt can only be established by circumstantial evidence, that is to say, by proof of such facts and circumstances as will conduce to establish his guilt in the minds of reasonable men. When a great crime has been committed, it is important to inquire whether the accused party was influenced by any motive to commit such an offense, for the absence of all motive to commit the offense charged against him affords a strong presumption of his innocence; whereas, if it appears on the contrary, that he was influenced by a very strong motive to commit the particular offense charged, the probability of his guilt is necessarily greatly strengthened.

Now, the offense with which the defendant stands charged in the indictment is, that as the cashier of the Central Railroad Bank, he did embezzle, steal, secrete, and fraudulently take and carry away a large amount of money which had been intrusted to him as such cashier. To purchase these lottery tickets, a considerable sum of money was required, as is manifestly apparent to every reasonable mind. But it is urged by the defendant's counsel, that these tickets were all purchased before the money is proved to have been taken from the bank, and therefore can not afford any presumption of his guilt. Concede for the purpose of this investigation that McAlpin and Fay, the directors who counted the money, were not deceived or mistaken as to the money being in the bank on the days which they profess to have counted it; yet the evidence of the lottery tickets shows, that to have purchased them, the defendant must have had money obtained from some quarter. Did he borrow the money to purchase the tickets from a friend? or did he purchase the tickets on a credit? Still the purchase of the tickets created a necessity for money; especially as the defendant was in debt, and hard pressed to live. The purchase of a great number of lottery tickets, anterior to the loss of the money by the bank, by the defendant created a necessity for him to have

money to pay for them. The purchase of the tickets created a debt, which the defendant was bound to pay, either with his own money or that intrusted to him by other people. By his own confessions, he had no spare cash of his own with which to purchase lottery tickets. Did he borrow the money from his friends or other persons to purchase them, before the money was taken from the bank? If so, he still had a use for money to pay that debt, and who would be most likely to take money intrusted to him, he who had purchased nothing which created a demand for money, or one who had a pressing necessity for it to pay for lottery tickets? The fact that the defendant had purchased a large number of lottery tickets before the money was taken from the bank, taken in connection with his pecuniary embarrassments, affords evidence of at least a motive on his part to have the use of money; and as such it was properly submitted to the jury, as a circumstance, taken in connection with the other evidence, affording a presumption of his guilt. The question is not as to the effect which this evidence may have had on the minds of the jury, but was it competent to introduce it on the trial, when taken in connection with the other facts exhibited by the record? We think the evidence offered was competent for the reasons already stated.

The second ground of error alleged in the assignment is, that the court erred in deciding that the bank bills, charged to have been stolen, were sufficiently described in the indictment. By the thirty-third section of the sixth division of the penal code it is declared, that "any officer, servant, or other person employed in any bank or other corporate body in this state, who shall embezzle, steal, secrete, or fraudulently take and carry away any money, gold or silver bullion, note or notes, bank bill or bills, bill or bills of exchange, etc., shall, on conviction, be punished by imprisonment and labor in the penitentiary for any time not less than two years nor longer than seven:" Prince, 631.

The defendant is accused in the indictment with embezzling, stealing, secreting, and fraudulently taking and carrying away one bank bill for the payment of five dollars, and of the value of five dollars, of the Central Railroad and Banking Company of Georgia, signed by the president thereof, R. R. Cuyler, and countersigned by the cashier thereof, George J. Bulloch, while holding the office and employment of cashier of the said Central Railroad and Banking Company of Georgia. The defendant is also charged with embezzling, stealing, secreting, and fraudu-

lently taking and carrying away other denominations of the bills of said bank, to wit, ten-dollar, twenty-dollar, fifty-dollar, and one-hundred-dollar bills—each denomination of the bills described in the same manner in the indictment as the five-dollar bill. The objection is, that the bank bills are not sufficiently described in the indictment. The general rule is, that every indictment must charge the crime with such certainty and precision that it may be understood; alleging all the requisites that constitute the offense, and that every averment must be so stated that the party accused may know the general nature of the crime of which he is accused: 1 Ch. Crim. L. 172. The defendant is accused with having stolen sundry bank bills of a particular denomination, and of a particular value, of the Central Railroad and Banking Company of Georgia, signed by the president of that company and countersigned by the cashier thereof, the same being the property of that bank, which were intrusted to the defendant as such cashier. This description of the bills alleged to have been stolen by the defendant is sufficient, in our judgment, to inform him of the general nature of the offense of which he is accused. If a more minute description should be required, as for instance the date and letter of each bill, a conviction under this section of the code would, in most cases, be impossible.

The legislature have made the stealing of bank bills larceny, and there exists no good reason why there should be a more minute description of bank bills than of chattels which are made the subject of larceny. The description of the bank bills in this indictment is equally as minute and specific as that contained in the form of a similar indictment in Archbold's Criminal Pleading, 130. See also *Rex v. Johnson*, 3 Mau. & Sel. 539, 553; *Commonwealth v. Richards*, 1 Mass. 337. But the first section of the fourteenth division of the penal code answers the objection raised by the plaintiff in error. By that section of the code it is declared, that "every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct which states the offense in the terms and language of this code, or so plainly that the nature of the offense charged may be easily understood by the jury:" Prince, 658. Nor do we entertain a doubt, that the defendant could plead the present indictment in bar of another prosecution for the same offense, and with the proper averments contained in such plea, would be protected.

The third ground of error assigned is, that the court refused

to arrest the judgment, on the ground "that the indictment contained defective counts, and counts in which different offenses were charged, and different punishments inflicted by statute, and that a general verdict of guilty had been rendered, without specifying the count on which the defendant was found guilty." It is a well-settled principle in criminal law, that where there are several counts in an indictment, some of which are good and others bad or defective, that judgment may be rendered against the defendant upon those which are valid: 1 Ch. Crim. L. 249; Id. 640; *The People v. Curling*, 1 Johns. 322; *The State v. Miller*, 7 Ired. L. 275. By the thirty-third section of the sixth division of the penal code, the officer of a bank who commits a larceny after a trust has been delegated, or a confidence reposed, may be punished by imprisonment in the penitentiary for any time not less than two nor more than seven years. By the thirty-sixth section of the same division of the penal code, any person, not an officer employed in any public department of the government or corporate body, who shall be convicted of the same offense, may be punished by imprisonment in the penitentiary for any time not less than one year nor longer than five years.

In some of the counts in the indictment the defendant is charged with the offense, as the cashier of the Central Railroad and Banking Company of Georgia; in others he is charged with the offense in his individual and not in his official capacity as cashier. The point made by the plaintiff in error then is, that inasmuch as there are different counts in the indictment, based upon the two different sections of the statute, and the punishment under each section being different in degree, therefore the judgment ought to be arrested, because the jury have found a general verdict of guilty without specifying upon which particular count they intended to find him guilty, so as to enable the court to pronounce the appropriate judgment. It has been urged in the argument, that the court can not know whether the jury intended to find the defendant guilty of the offense under the thirty-third section or under the thirty-sixth section of the code, and that this is a material question, because the punishment prescribed under the two sections is different in degree. By the sixteenth section of the fourteenth division of the penal code it is declared, that "on every trial for any crime or offense the jury shall be judges of the law and the fact, and shall, in every case, give a general verdict of guilty or not guilty:" Prince, 660. The question is not whether the court should have

quashed this indictment on demurrer, or compelled the prosecuting officer to elect on which count of the indictment he would try the defendant; but the question here is, whether the judgment shall be arrested. As a general rule of criminal pleading, a defendant can not be charged with distinct offenses in the same indictment; as, for instance, larceny in one count and perjury in another, for the reason that it would necessarily embarrass him in his defense; for he might be willing that a juror should try him for one offense and not the other; but the same offense, that is to say, the same species of the offense, may be charged in different ways in several counts, in order to meet the evidence: Arch. Cr. Pl. & Ev. 30, 31. It is no objection to an indictment that the punishment of the offense in one of the counts is positive, and in the other discretionary; for after a general verdict, the objection of misjoinder may be avoided, by entering up judgment upon a particular count: 1 Ch. Crim. L. 255. The defendant is not charged with two distinct offenses in this indictment, but he is accused in all the counts with the offense of "larceny, after a trust delegated and confidence reposed."

There is nothing in the different counts which would have a tendency to embarrass him on his trial, or to deprive him of any legal right. The character of the offense is the same in all the counts, and he was entitled to the same number of peremptory challenges, in the selection of his jurors, to try him upon each and every count in the indictment. The stealing the bank bills as the cashier of the bank, after a trust delegated and confidence reposed, and stealing the same without being employed in any official capacity, constitutes the only difference. In any view of the question, the offense is stealing the bank bills of the Central Railroad and Banking Company, after a trust delegated and confidence reposed. But it is urged, that stealing the bills as cashier is, in view of the statute, a higher grade of the offense than if he stole them without being such cashier. Admit it to be so, and what is the legal inference from the general verdict of guilty found by the jury? Both counts in the indictment being good, the presumption of the law is, that the jury intended to find him guilty of the highest grade of the offense charged in the indictment, as much so as if on an indictment for murder containing two counts, one for murder and the other for manslaughter, the jury had returned a general verdict of guilty. On the trial of an indictment containing two counts, one for murder and the other for manslaughter, and a general

verdict of guilty found by the jury, the defendant would be punished for the higher grade of the offense for the reason that the jury having found the defendant guilty generally, the presumption of the law is, that they intended to find him guilty of the highest offense with which he was charged in the indictment—murder and manslaughter being the same species of crime, to wit, homicide, but differing only in the degree of guilt. So in the case before us, the defendant is charged in all the counts of the indictment with the same species of crime, to wit, larceny after a trust delegated and confidence reposed, but differing only in the degree of guilt which attaches to the offense when committed under the thirty-third section or the thirty-sixth section. The count in the indictment which charges the defendant with stealing the bank bills from the bank, as the cashier thereof, under the third section, being a good count, and the jury having found him guilty generally, it is competent for the court to award judgment against him upon that count, and the motion in arrest of the judgment was properly overruled by the court below, both upon principle and authority: Arch. Cr. Pl. & Ev. 31; *Young et al. v. The King*, 3 T. R. 106; *The People v. Rynders*, 12 Wend. 426; *Josslyn v. The Commonwealth*, 6 Met. 236; *Harman v. The Commonwealth*, 12 Serg. & R. 69; *The King v. Darley*, 4 East, 179; *The United States v. The Pirates*, 5 Wheat. 207; S. C., 4 Pet. Cond. Rep. 636. In the last case cited, it was held, that each count in an indictment is a substantive charge, and if the finding conform to any one of them, which in itself will support the verdict, it is sufficient to give judgment. Besides, the second section of the fourteenth division of the penal code declares, that “no motion in arrest of judgment shall be sustained for any matter not affecting the real merits of the offense charged in the indictment:” Prince, 659.

The fourth ground of error taken in the assignment is, that the court, in charging the jury, stated, “that it was competent for them to look to circumstantial testimony, as, for instance, the acts and conduct of the accused, to ascertain his guilt; such as his absconding and concealing himself for the purpose of escaping the laws, or his being possessed of or using large sums of money which he could not honestly account for.” It is insisted that the court in this charge violated the provisions of the act of the twenty-first of February, 1850, which prohibits the judges of the superior courts of this state to express or intimate their opinions as to what has or has not been proved, or as to the guilt of the accused: Pamph. L. 1850, 271. On looking

to the charge of the judge, as certified by him in this record, we think there is no foundation for this objection. The presiding judge expressly states that he did not, in any part of his charge, express or intimate, in the remotest manner, his opinion as to what had or had not been proved, or his opinion as to the guilt of the prisoner, but, on the contrary, was extremely guarded on that point.

The fifth ground of error which has been taken and urged before this court is, that the offense for which the defendant is indicted is created by statute, and the indictment does not conclude, *contra formam statuti*, nor in the manner prescribed by the penal code of this state. By the first section of the fourteenth division of the penal code, the form of every indictment or accusation is prescribed, including the commencement and the conclusion thereof: Prince, 658.

Whatever may have been the rule before the enactment of this code by the legislature, all indictments for offenses under it are now to conclude, after stating the offense, "contrary to the laws of said state, the good order, peace, and dignity thereof." But it is said the several counts in this indictment do not so conclude as against the defendant Bulloch, and to maintain that position, it is assumed that there are twenty-four counts in this indictment, instead of twelve. How is the fact? Is the accusation against Bulloch, as the principal offender, contained in a separate count against him, independent of James Quantock and George Thrift as accessaries? or are they all accused in each count, the one as having actually committed the offense, the others as being accessaries after the fact? Each count in the indictment charges and accuses George J. Bulloch with the offense of larceny, after a trust delegated and confidence reposed, and James Quantock and George Thrift as being accessaries thereto after the fact; and after stating the offense against both, as directed by the first section of the fourteenth division of the code, concludes in the manner prescribed thereby, as being "contrary to the laws of said state, the good order, peace, and dignity thereof." This indictment is believed to have been framed by the pleader in strict conformity with the English precedents. After stating the offense of the principal (says Mr. Archbold), and immediately before the conclusion of the indictment, charge the accessory after the fact, thus, etc.: Arch. Cr. Pl. & Ev. 401. In each count of this indictment, the accusation is made against all three of the defendants; the offense of the principal offender is stated, and before the conclusion of each count the accessory

after the fact is charged in accordance with the most approved English precedents, and then each count concludes in the manner prescribed by the penal code. We can not for a moment doubt that the pleader, in framing this indictment, upon anything like a fair construction of it, included the principal offender and the accessaries after the fact in one and the same count, and that he so intended, is obvious from the commencement and conclusion of each and every one of the counts. There being in our judgment but twelve counts in the indictment, each one concluding in the manner and form prescribed by the penal code of this state, the fifth ground of error assigned upon the record must be overruled. Having disposed of all the grounds of error assigned to the judgment of the court below, contained in the record, it only remains for us to declare that judgment to be affirmed.

The judgment of the court below affirmed.

MOTIVE FOR KEEPING HOUSE OF ILL-FAME need not be shown: *State v. Nixon*, 46 Am. Dec. 135; and motive need not be shown to justify a verdict of guilty on indictment for murder: *Sumner v. State*, 36 Id. 561.

DESCRIPTION OF MONEY, BANK BILLS, ETC., IN INDICTMENT is fully discussed in note to *Lord v. State*, 51 Am. Dec. 231.

EFFECT OF GENERAL VERDICT OF GUILTY upon an indictment or information containing several different counts: See *State v. Crank*, 23 Am. Dec. 117; *State v. Smith*, 5 Id. 132.

IT IS SUFFICIENT IF INDICTMENT STATES CHARGE with sufficient certainty to inform the defendant what he is called upon to answer: *Sherban v. Commonwealth*, 34 Am. Dec. 460.

INDICTMENTS FOR OFFENSES CREATED BY STATUTE MUST CONCLUDE, "CONTRA FORMAM STATUTI:" *Chapman v. Commonwealth*, 34 Am. Dec. 565; *Warner v. Commonwealth*, 44 Id. 114.

INSTRUCTION WHICH AMOUNTS TO COMMENT UPON TESTIMONY is erroneous: *Groatkin v. Commonwealth*, 33 Am. Dec. 264.

THE PRINCIPAL CASE IS CITED in *Berry v. State*, 10 Ga. 519, to the point that a description of coin as so many dollars in gold and so many dollars in silver, is a sufficient description; also in *Hoskins v. State*, 11 Ga. 92, to the point that upon a general verdict of guilty the court will award judgment upon the highest grade of the offense; and in *Long v. State*, 12 Id. 316; *Welch v. State*, 50 Id. 128; *Estes v. State*, 55 Id. 131, to the same point; and in *Loyd v. State*, 45 Id. 71, to the point that the principal and accessory may both, by proper averments, be charged in the same indictment.

WINTER v. JONES.

[10 GEORGIA, 190.]

COURT MAY DECLARE ACT OF LEGISLATURE UNCONSTITUTIONAL.**EXTENT OF CHANGE IN CONTRACT, BY ACT OF LEGISLATURE,** is immaterial, in order to make said act unconstitutional, as impairing the obligation of contracts.**IMPOSING CONDITIONS NOT EXPRESSED IN CONTRACT,** or any slight deviation from its terms, is within the constitutional prohibition.**CONTRACT BETWEEN INDIVIDUAL AND STATE IS EQUALLY PROTECTED** by the constitution with a contract between private parties.**RIGHTS CREATED BY ACT OF LEGISLATURE, BEING EQUIVALENT TO CONTRACT EXECUTED,** can not be impaired by a subsequent legislature.**COURTS HAVE NOTHING TO DO WITH WISDOM, SOUND POLICY, OR EXPEDIENCY OF LAW.****LAW SHOULD BE UPHELD AS VALID IF POSSIBLE.****COST OF CONVEYANCE FALLS UPON PURCHASER** in the absence of an agreement.**CONSTITUTIONALITY OF LAW.**—An act of the legislature provided for the sale of land, and the payment of a certain fee to take out a deed from the state. A subsequent act provided that unless the deed was paid for within a certain time the land would be forfeited to the state. *Held*, that the latter act was unconstitutional, as impairing the obligation of the above contract.**HOLDER OF RECEIPT FROM STATE FOR PURCHASE PRICE OF LAND** is indefeasibly entitled to a patent, and said receipt is inchoate evidence of an absolute title.**EVERY PRESUMPTION IS IN FAVOR OF VALIDITY OF GRANT.****COURT OF EQUITY IS BETTER QUALIFIED THAN COURT OF LAW** to examine into the authority or capacity of a party to convey title.**STATE PATENT PURPORTING TO CONVEY TITLE, WHICH IS VOID UPON ITS FACE,** as where the state had no authority to convey, may be collaterally attacked in an action of ejectment.**PATENT ISSUED BY VIRTUE OF UNCONSTITUTIONAL ACT IS VOID UPON ITS FACE.**

EJECTMENT in Muscogee superior court. Plaintiff claims title as purchaser under a sale authorized by the act of 1847. The remaining facts appear from the opinion.

Holt, for the plaintiff in error.

Benning, for the defendant.

By Court, LUMPKIN, J. This is an action of ejectment, for fraction No. 10, in the seventh district of Muscogee county, purchased originally at the sales in 1828, under the provisions of the act of the twenty-second of December, 1827. Seaborn Jones, the defendant in error, became the purchaser, for the sum of one thousand five hundred and fifty dollars, received a certifi-

cat. in accordance with the provisions of said act, and transferred the same to one Stephen W. Ingersoll. The whole purchase money was paid, prior to the passage of the act of 1834, for the sale of reverted fractions; and the certificate of said sale, with all the installments duly paid thereon, became legally vested in John G. Winter, plaintiff in error, by sundry mesne conveyances.

Subsequently to that time, to wit, in December, 1847, an act was passed, by which said fraction was declared, under certain conditions, forfeited to the state, and ordered to be resold. It was sold, and Seaborn Jones, the defendant in error, again became the purchaser, and instituted this suit to recover possession of the premises, together with the mesne profits; and a judgment was rendered for the same in his favor, in the superior court of Muscogee county.

At the trial, counsel for the defendant below requested the court, among other things, to charge the jury that the act of 1847, so far as it provides for the forfeiture and resale of the fractional lot in dispute, on the ground that the purchaser had failed to take out the grant, was void, because repugnant to the tenth section of the first article of the constitution of the United States, which declares, that "no state shall pass any law impairing the obligation of contracts," which request was refused. And to this ruling counsel for John G. Winter excepted, and filed his writ of error to this court. The only question which I propose to discuss is the alleged repugnance of the act of 1847 to the constitution.

The power of the judiciary to pronounce against the validity of those laws which contravene the constitution, however delicate and embarrassing in the exercise, has ceased to be a debatable question in the courts of the Union. At an early period this power was denied, on the ground that the judiciary being at most but a co-ordinate branch of the government, they could not defeat or control the legislative will by vacating laws, of the constitutionality of which one department had no better right to judge than the other.

But the conclusion to which the whole country has come, with a concurrence of opinion and unanimity of sentiment which leaves no room to doubt its correctness, is, that the constitution is the paramount law of the land; and that all legislative acts which impugn its provisions are not merely voidable, but absolutely void. That the question was between conflicting laws, one of which must give way and the other stand; and the

whole point was whether the court, who could execute but one of the laws, had a right to decide whether there was a conflict, and which should yield. That the judiciary owe a duty to the constitution above that which they owe to the legislature, and that when one says one thing and the other a contrary thing, they must obey the constitution, which is in effect deciding against the law.

The same section of the constitution which restrains the individual states from passing any law impairing the obligation of contracts, prohibits them also from passing any bill of attainder, *ex post facto* law, from making anything but gold or other coin a tender in payment of debts, or granting any title of nobility. Suppose, what I admit is not very likely to happen, that the legislature should pass an act of attainder against an obnoxious citizen for treason, or making cotton or any other thing but gold and silver a lawful tender, or conferring the title of marquis or duke upon some one for meritorious services rendered the public: will it be pretended that the courts could be compellable to execute such laws, against the plain meaning and express words of the constitution? No one, I apprehend, having a proper sense of the obligation of an oath will contend for or defend such a doctrine. It carries the highest degree of impiety, as well as absurdity upon its face. True, these are strong cases; but the manner of a degree in which these constitutional inhibitions are violated can make no difference: See 1 Tuck. Black., app. 293, 355.

While, therefore, I shall always feel it to be both my duty and pleasure fairly and patiently to compare legislative acts with both the state and federal constitutions, and if possible to reconcile the one with the other, yet, when fully satisfied in my judgment and conscience that they violate these paramount laws which I have sworn to support, I shall not hesitate to adjudge them nugatory, regardless of the consequences; deriving consolation from the conviction that I have faithfully performed my duty, and that the people will sooner or later do me justice.

Assuming it as a principle, then, that a case may occur where it may become the duty of the judiciary to declare a statute of the state contrary to the constitution, and where they may be called upon to arrest its execution, we are led to inquire whether the act in question is of this character. All the commentators, and all the adjudicated cases upon constitutional law, agree in these fundamental propositions: that the objection to a law, on the ground of its impairing the obligation of a contract, does

not depend upon the extent of the change which the law may make in it; that any deviation from its terms, by imposing conditions not expressed in the contract, however minute and apparently immaterial in their effect, is within this constitutional prohibition.

Moreover, it is well settled, that a contract entered into between the state and an individual is as fully protected by this prohibition as a contract between two individuals; that the contracting parties, whoever they may be, stand in this respect upon the same ground; that the obligations imposed, and the rights acquired by virtue of the contract, can not be impaired by a legislative act; that a constitutional act of the legislature which is equivalent to a contract when performed, is a contract executed, and whatever rights are thereby created a subsequent legislature can not impair: Smith on Const. L. 382, 385; Story on Const., secs. 1379, 1385; 1 Kent's Com., sec. 19, p. 388; *Green v. Biddle*, 8 Wheat. 1, 84; *Fletcher v. Peck*, 6 Cranch, 87, 135; *Trustees of the Bishop's Fund v. Rider*, 13 Conn. 87; *State v. Wilson*, 7 Cranch, 164; *Terrett v. Taylor*, 9 Id. 43; *Sturges v. Crowingshield*, 4 Wheat. 122; *Dartmouth College v. Woodward*, 4 Id. 518; *Atwater v. Woodbridge*, 6 Conn. 223 [16 Am. Dec. 46]; *Osborne v. Humphry*, 7 Id. 336; *The Derby Turnpike Co. v. Parks*, 10 Id. 522 [27 Am. Dec. 700]; *Landon v. Litchfield*, 11 Id. 257; *The People v. Platt*, 17 Johns. 195 [8 Am. Dec. 382]. Let us test the act under review by these principles.

The legislature, at its session in 1827, passed an act to dispose of the residue of the lands before that time reserved for the state. The first, second, and third sections provide for the appointment and qualification of the commissioners who were to carry the law into effect, the surveying of the land, etc. By the fourth section it is enacted, "that the highest bidder for any fraction or fractions, lot or lots, of land or islands authorized to be sold by the act, shall be the purchaser, who shall pay to the commissioners aforesaid one fifth of the purchase money in specie or current bills of any chartered bank of the state; on the payment of which the said commissioners, or a majority of them, shall give to such purchaser a certificate, stating the amount paid and the amount of said purchase money then due, and to be paid in four equal installments." Section 5 enacts, "that any purchaser failing to pay any installment to the treasurer within sixty days after the same becomes due shall forfeit the amount paid, and said lands shall revert to and become the property of the state." By the sixth section it is further enacted, "that when the last

installment is paid, according to the face of the certificate given by the commissioners, it shall be the duty of the governor to cause a grant or grants to be made out in the name of the holder of said certificate, agreeably to the laws then in force regulating grants, which said grant shall be given to the holder of said certificate or certificates, on his or her paying of the sum of four dollars and fifty cents into the treasury of this state for office fees:" Dawson's Comp. 267.

The certificate given by the commissioners, in pursuance of the fourth section of this act, stated the amount paid on each fraction, and the amount of purchase money due, and to be paid in five annual installments, with the condition or clause of forfeiture, on failure to pay each installment within sixty days after they severally became due. And this is the whole contract between the state and the purchaser. The state, on her part, reserves the right to reclaim the land on the non-payment of any part of the price, and to retain the money already paid; and she obliges herself to make out a grant so soon as the last installment is paid, and deliver it to the purchaser or his assignee upon the payment of four dollars and fifty cents, the office fees, the remuneration fixed for executing a title.

The purchaser, on his part, obliges himself to pay a certain sum for the land, in five installments, and consents to forfeit the land, together with the payments already made, should he fail to pay either of the installments as required by the act and the certificate issued by the commissioners by the direction thereof. The purchaser agrees to pay four dollars and fifty cents for the grant, before he is entitled to receive the same.

And this is all that can be contended for, even if the sixth section is embodied in the contract and considered as constituting a part thereof. But counsel for plaintiff in error have insisted, and we think it difficult to answer the argument, that the fourth and fifth sections of the act, and the certificate executed conformably thereto, stating the terms of purchase and the mode of payment, with the forfeiture annexed, contain all the contract; and that the sixth section is merely directory to the governor to deliver a grant to the holder of the certificate (whensoever he shall wish to have his title evidenced by a grant), upon payment of the office fees.

Such, then, is the contract made by the parties in 1828, under the act of 1827; and it is conceded that the contract can not be enlarged or abridged, or saddled with conditions not expressed in the contract, except by mutual consent of both parties to the

agreement; and that any law having this tendency is unconstitutional and a nullity. Does not the act of 1847 have this effect? Is it not obnoxious to this objection?

It limits the time of taking out the grant until the first day of November next ensuing its passage, and imposes as a penalty for non-compliance a forfeiture of the land. Are there any such terms or conditions as these expressed in the contract? Is it not silent upon this subject? It provides expressly, that a failure to make punctual payment shall work a forfeiture. Is it not strange and unaccountable that the neglect or omission to take out a grant should be made now to produce the same result, when neither the law nor certificate included any such provision? If one cause of forfeiture is expressly provided for, is not the inference strong and irresistible that all others are excluded, especially when the cause of forfeiture sought to be lugged in is of a different character and description altogether from those which are enumerated?

Was it left out through neglect or forgetfulness? This can hardly be supposed, when the attention of the legislature was directed to the very subject of what should or should not work a forfeiture of the property purchased.

Our conclusion is, that there was no such intention in the minds of either of the contracting parties. It was certainly not the understanding of the vendee, or after paying one thousand five hundred and fifty dollars for the fraction he surely would not have permitted this valuable interest to revert to the state by withholding the pittance exacted for the grant; and the character of the state for justice and liberality forbids that any such design should be imputed to her.

How broad the difference between this class of cases and that where the purchaser has failed to pay the amount of the purchase money! And notwithstanding there are some expressions in the act of 1847 which would seem to apply to both, yet, for myself, I can not resist the belief that it was not so understood or intended by the general assembly. I infer this, not merely from the manifest wrong which such a measure would inflict upon the purchaser who had promptly fulfilled his engagement to the public, but from the words of the act itself. It is "to authorize the governor to appoint fit and proper persons to sell and dispose of the undrawn lots in the land lotteries heretofore had in this state; and to limit the time for fraction purchasers to pay for and take out grants for fractions."

Who would suppose, whatever may be the strict grammatical

construction of this language, that it was designed to embrace purchasers of fractions who had already paid the whole purchase money? So much for the title. Again, the first section provides, "that all persons who have purchased fractional lots in this state, under the laws requiring them to take out grants for said purchases, shall have until the first day of November next thereafter to take out their grants."

But what law is there "requiring" purchasers who have paid up the whole amount of purchase money to take out grants? The act of 1827 makes no such requisition, much less does it declare a forfeiture on failure to do this. No time is prescribed even within which grants are to issue. It only enacts, that when the installments are all paid, agreeably to the certificate given by the commissioners, that it shall be the duty of the governor to cause grants to issue, and to be delivered to the holder of the certificate, upon the payment of the office fees.

I will not be guilty of the disrespect of saying that there has been any misconception or perversion of the intention of the law-making power, in the practical interpretation which has been given to the act of 1847; but reposing, as I do, the utmost confidence in the wisdom and justice of the representatives of the people, I entertain no doubt whatever that upon a re-examination of the question, they will repudiate any such intention as that which has been ascribed to this act, and solemnly affirm the view which we take of it.

I am aware that with the wisdom, sound policy, and expediency of a law the courts have nothing to do. These are matters purely of legislative deliberation and cognizance.

Still, before determining that the constitution has been plainly and palpably infringed, incautiously or otherwise, by a co-ordinate branch of the government, the best energies of our minds should be employed in putting such construction upon it as to uphold it if possible, and carry it into effect, *ut res majis valent quam pereat*.

Be this as it may, however, for myself, I can never consent that the omission to take out a grant in this case, within the time limited by the act of 1847, or within any other period, by a purchaser who has paid up the whole amount of the purchase money, shall work a forfeiture of the property, there being no such condition, expressed or implied, in the original contract of sale between him and the state. That fractions which were bought and not paid for should revert to and again become the property of the state, is perfectly right, for such was the bargain

between the state and the citizen; and that it was entirely competent for the legislature to make such disposition of this portion of the public domain as is provided for in the act of 1847, there can be no doubt. And that drawn lots, where the fortunate drawer failed to take out his grant, as in *Brinsfield v. Carter*, 2 Ga. 143, should be subject to like disposition, it is equally clear. For these, too, by the terms of the contract, the person drawing "and failing to take out his grant within two years from the date of the draw, forfeited his right to receive a grant to the land so drawn, and the same reverted to the state:" Dawson's Comp. 256.

But could any two cases be more distinguishable in principle than *Brinsfield v. Carter* and *Winter v. Jones*? Besides, in lottery lands the eighteen dollars was not the office fee, neither was it the price of the grant. It was a revenue provision. It was the whole consideration received by the state when she parted with her title to the property. The mere drawing did not vest the right. It clothed the drawer with the pre-emption right of purchasing the land at eighteen dollars, on a credit of two years.

But in the case before the court, the purchase money, one thousand five hundred and fifty dollars, was the consideration received by the state for parting with her right of property in the fraction; and the four dollars and fifty cents grant fee was the price fixed upon which the purchaser should pay for his title; an expense which, without any stipulation, would have fallen upon him by the course of common law, in cases between individuals. For unless there is an express agreement to the contrary, the cost of the conveyance falls upon the purchaser: Sugd. on Vend. 296. And it would be monstrous to maintain that the insertion of a clause in the act of 1827, which the law would have implied without it, should operate so prejudicially to the purchaser. The maxim is, *Expressio eorum quæ tacite insunt nihil operatur*.

Believing then, as we do, that this contract, made between the legally authorized agents of the state and the purchaser of this fraction, in conformity with the act of 1827, is under the protection of the tenth section and first article of the constitution of the United States, and that the act of 1847, if it warranted the subsequent sale made under it of this fraction, because the grant had not been taken out, impairs the obligation of this contract by superadding a condition or clause of forfeiture not contained therein, we feel ourselves bound to de-

clare it invalid, and to award a judgment to the plaintiff in error.

And here we might leave the case. It may not be amiss, however, to inquire what is the nature and extent of Winter's title. In the case of *Sims' Lessee v. Irvine*, 3 Dall. 425, this doctrine was elaborately considered. The question to be determined was, whether a warrant and survey and payment of the consideration gives a legal right of entry sufficient to maintain an ejectment. Counsel in the negative insisted that a patent was essential to the title of the plaintiff; that until that issued, the terms of the bargain were not settled, nor had the proprietors parted with the fee; that it was a paradox to maintain that the legal estate could exist in the proprietors and the purchaser at the same time.

But the court held that a warrant and survey, where no money remained to be paid, had uniformly been deemed a legal title, as opposed to an equitable one; and had all the consequences as such, even as to dower, which was conclusive as to its being a legal title, there being no dower of an equitable estate; and that a patent was only necessary to ascertain that all previous requisites had been complied with.

In the *Lessee of Penns v. Klyne*, 1 Wash. C. C. 207, the court say: "The plaintiff has no patent, but yet by the common law of this state, a warrant and survey, if the consideration be paid, gives a legal title against the proprietary, as much so as if the patent had been granted. If the consideration be not paid, then the legal title is not out of the proprietary; but still the warrant holder has an equitable title, which he may render a legal one by paying what is due to the proprietary." See also the *Lessee of Copley v. Riddle*, 2 Id. 354, to the same point. *Carson's Lessee v. Boudinot*, Id. 33, and the *Lessee of Vanhorn v. Chesnut*, Id. 160, draw the same distinction between a legal and equitable title, which consists in the payment or non-payment of the purchase money to the state, and affirm, by implication, the same doctrine.

In Kentucky, in the case of *Thomas v. Marshall*, Hard. 19, it was held that this was an inchoate legal title, and might be aliened and sold under execution. And in *Shearer v. Clay*, 1 Litt. 260, the supreme court of that state held, that neither the delivery nor the acceptance by the grantee of a patent is necessary to the consummation of title.

This question has been frequently before the courts of Alabama. and in *Goodlet v. Smithson*, 5 Port. 245 [30 Am. Dec. 561],

was examined at some length. This was an action of trespass to try titles. The plaintiff relied upon a sheriff's deed, and proposed to show by proof that the land he claimed had been entered by the defendant in execution in the land office of the Coosa land district previous to the sheriff's levy upon it; and that full payment had been made by the defendant, who had secured the certificate thereof in due form of law. The circuit court charged the jury on the trial, that previous to the issuing of a patent, the purchaser of land from the United States had no such title therein as was subject to levy and sale. Goodlet, having failed in his suit, prosecuted a writ of error to reverse the judgment rendered against him, and assigned for error in the supreme court the instructions before stated.

And after argument, the appellate tribunal held, that in cases of sales made by the government, the law gives the right, and the patent may be considered, not as the title itself, but as the evidence by which it is shown that the prerequisites of a legal title have been complied with; that the act of purchase transfers an immediate right of possession; and that the title thus acquired is sufficient to enable the purchaser to arrest an intruder by due course of law; and that the certificate which was required to be given until the patent could issue, where the money was all paid, was evidence that the purchase was complete; and that by act of entry and payment of the purchase money the purchaser of land from the United States (and I add from each of the individual states) acquires an inchoate legal title, which would descend, and might be aliened or sold under execution, as any other legal title.

The same court, in *Bullock v. Wilson*, 2 Port. 436, decided two years earlier, expressed an opinion upon the grade of interest or title indicated by a paper like that held by Winter. They say that by the laws of the United States the legal and *bona fide* holder of a receipt or certificate of this kind is indefeasibly entitled to a patent; and so we say that John G. Winter is indefeasibly entitled to a grant, that is, has a right to one, which no power under heaven can defeat, annul, or abrogate. Nothing more is necessary on his part to secure it. He already has a legal right. The receipt and the law imperatively command the issuing of the patent or the complete evidence of the title; and until this is done, the receipt for the purchase money is the best evidence of the right which the nature of the case admits of.

And while the chief justice, in delivering the opinion of the court, admits that a paper title like this is fully within the

equity of the statute passed in that state in 1812, Aik. Dig. 283, still he did not consider receipts of this nature as requiring the aid of any statute. For that, upon the principles of the common law, they must be regarded as evidence of a grade of title which at least confers the right of possession; and this alone is sufficient to maintain trespass. But the judge held that it was more; that it was nothing less than inchoate evidence of an absolute title.

The case of *Masters v. Eastis*, 3 Port. 368, is not considered at variance with the principle decided in these cases. And if it was, it was virtually overruled by *Goodlet v. Smithson*, which was decided twelve months after it. Judge Goldthwaite, in referring to the case of *Masters v. Eastis*, supposes that the judgment was predicated upon some defect in the mesne conveyances, the certificate having been probably assigned by mere indorsement, which would not pass the title. For that while it was ruled that the grantee of the United States must succeed against the assignee of a certificate which had previously been held by the grantee, and which he had assigned to him, yet the court directly and explicitly recognize the principle, that if a conveyance had been made by deed, the title of the grantee by the patent would have inured to the defendant in that action.

The case of *Masters v. Eastis*, therefore, is a direct authority in favor of Winter, so far as the main principle involved in this controversy is concerned; for it concedes that where the certificate has been transferred to the present holder, so as to pass the property, nothing remains in the state but the naked legal title; that whenever the grant issues, it inures to the benefit of the *bona fide* holder.

And this court, in accordance with this current of authority, which might be greatly multiplied, ruled, in *Pitts v. Bullard*, 3 Ga. 10 [46 Am. Dec. 405], that where the vendee has paid for the land, he has such a legal estate as subjects it to levy and sale under an execution at law; and that no conveyance was necessary to vest in the purchaser the legal estate.

So, in this case, the state retained nothing but the naked title, and this she held as trustee for the purchaser; and this was all the legislature could dispose of.

But it is argued that Winter had not paid the four dollars and fifty cents grant fee. I have endeavored to show that, under the act of 1827, this was no part of the purchase money or consideration for the land. The state did not so understand it; for the purchase money was divided into five installments, and

the grant fee was a separate and distinct matter, and provided for in a separate and distinct section of the statute. It was to remunerate the officers of the government for their personal labor in preparing the title, and is so stated in the act itself.

But it is not necessary to this case to establish that Winter held such an estate in this fraction as would subject it to sale under a common-law *fi. fa.* It is enough that, under the contract, a right had vested in him to have the grant made out upon the payment of four dollars and fifty cents, the only condition prefixed to its delivery. And there was no time limited within which the application was to be made, but it was left entirely to the option and convenience of the purchaser. And to attempt, under these circumstances, to deprive a citizen of his land for omitting to apply for a grant within ten months from the date of the act is a procedure at war with the whole policy and practice of the state, from its organization down to the present period.

But is it competent for a court of law to go behind the grant, and examine into the authority upon which it was issued?

Whatever doubts may have arisen at one time in England on this question, and whatever conflict of opinion may have existed in the different state courts respecting it, there can be none at this day in this country.

It is true that every presumption is in favor of a grant. That every prerequisite has been performed, is an inference properly deducible from the fact that it is the act of the highest office of the state, and performed in the execution of a function prescribed by law, and requiring the exercise of judgment and discretion. It would, therefore, be extremely unreasonable to avoid a grant in any court for irregularities in the conduct of those who are appointed by the government to supervise the progressive course of a title, from its commencement to its consummation in a grant. But there are some things so essential to the validity of the contract, that the great principles of justice and of law would be violated did there not exist a tribunal to which an injured party might appeal, and in which the validity of the grant might be examined: *Polk's Lessee v. Wendal*, 9 Cranch, 87.

In general, a court of equity appears to be a tribunal better adapted to this object than a court of law. But there are cases where a grant is absolutely void, as where the state has no title to the thing granted; or where the office had no authority to

issue the grant. In such cases, the validity of the grant is necessarily examinable at law: *Polk's Lessee v. Wendal*, 9 Cranch, 87.

Says Chief Justice Kent, in *Jackson v. Lawton*, 10 Johns. 23 [6 Am. Dec. 311]: "If the elder patent in the present case was issued by mistake or upon false suggestions, it is voidable only; and unless letters patent are absolutely void on the face of them, or the issuing of them was without authority, or was prohibited by statute, they can only be avoided in a regular course of pleading, in which the precise irregularity or mistake is directly put in issue."

And in *Patterson v. Winn*, 11 Wheat. 380, the supreme court says: "We may, therefore, assume as the settled doctrine of this court, that if a patent is absolutely void upon its face, or the issuing thereof was without authority or prohibited by statute, or the state had no title, it may be impeached collaterally in a court of law, in an action of ejectment. But in general, other objections and defects complained of must be put in issue in a regular course of proceeding to avoid the patent."

The practice which has always prevailed in the courts of Georgia, so far as we have any information upon the subject, is in accordance with the rule here laid down.

Now, the grant in this case, under which Jones, the plaintiff in ejectment, claims, purports upon its face to be issued by virtue of the act of 1847, and the executive order founded thereon. But if that act is unconstitutional, then there is no authority for issuing this grant; and, of course, the grant itself is void, and it is within the province of a court of law to pronounce upon its invalidity. If an act deriving its authority from a supposed law should come before the court, there could be no doubt, I presume, of the court's power to defeat the act, if the law was found not to exist. And such precisely is the case where an act is founded upon a law repugnant to the constitution. The antagonism being ascertained, it is not law; it loses at once the vital efficacy of the law.

Not only is this grant, therefore, void upon its face for want of authority, but it is also void because the state did not own the fraction at the time the grant issued, and consequently could convey no title to it.

It is unnecessary, perhaps, to express any opinion upon the facts admitted upon the record in this case, but which are *dehors* the grant. It appears that the agent of the state, General James N. Bethune, was in Columbus up to day of sale, and at the sale, with instructions to suspend the sale of any

fraction where the owner or holder of the certificate would come forward and furnish evidence that the purchase money had been paid, and pay the grant fee; that no notice was given to John G. Winter, the owner of the fraction, who resided in Columbus, or to the tenant in possession of the land; and that Mansfield Torrence, who was interested with Colonel Jones in purchasing this fraction, requested the officer to withhold the notice.

In a bill filed on the equity side of the court, I am inclined to think that a jury would feel themselves warranted upon this testimony in setting aside this grant by their decree, as having been fraudulently obtained. It was a fraud upon the state, in diminishing the public revenue by preventing competition at the sale; and it was a fraud upon the party, by keeping him in ignorance of his peril; whereas, by receiving the notice required by the law, it would have enabled him timely to have interposed to protect his property, and save himself the expense and trouble of this litigation.

Upon the whole, therefore, without pursuing this investigation any further, and without deciding upon the other points of law made by the bill of exceptions, we are unanimously of the opinion, that upon the ground alone that the grant to Seaborn Jones is void in law the judgment of the circuit court must be reversed.

Few cases, if any, have been argued more forcibly and eloquently by counsel on both sides than this; and I beg leave to tender my special acknowledgments to R. J. Moses, Esq., for the brief which he has furnished. It is simple, concise, and nervous; alike remarkable for the distinctness with which he presented his case, the perspicuity of its analogies, and the accuracy with which his legal references were made to sustain it.

OBLIGATION OF CONTRACT IS IMPAIRED by any deviation from its terms, by postponing or accelerating the period of its performance, or imposing new conditions, or dispensing with the performance of conditions, however minute or apparently immaterial: *Bailey v. P. W. & B. R. R. Co.*, 44 Am. Dec. 593; see also *Gray v. Monongahela Nav. Co.*, 37 Id. 500.

CHARTER OF CORPORATION authorizing it to maintain a toll road is a contract within the constitutional protection: *Backus v. Lebanon*, 35 Am. Dec. 466, and cases collected in note, page 471. But a retroactive exemption statute is not unconstitutional: *Rockwell v. Hubbell*, 45 Id. 246, and note. For a full discussion of the power of the legislature to repeal a corporate franchise under a conditional reservation, see note to *Miners' Bank v. U. S.*, 43 Id. 118.

LEGISLATIVE GRANT IS CONTRACT, and can not be repealed unless that

right is reserved or the grantee assents: *Derby Turnpike Co. v. Parks*, 27 Am. Dec. 700. See further, for acts which have been held unconstitutional, *Lewis v. Brackenridge*, 12 Id. 228; *Pingray v. Washburn*, 15 Id. 676; *Trustees v. Bralbury*, 26 Id. 515; *Trustees v. Foy*, 3 Id. 672; *Boisdere v. Citizens' Bank*, 29 Id. 453; *Officer v. Young*, 26 Id. 268; *Tate v. Bell*, 26 Id. 221; *Bowdoinham v. Richmond*, 19 Id. 197; *Starr v. Robinson*, 6 Id. 732; *Smith v. Ward*, 8 Id. 183; *January v. January*, 18 Id. 211; *Jones v. Crittenden*, 6 Id. 531; *Townsend v. Townsend*, 14 Id. 722; *Baily v. Gentry*, 13 Id. 484; *Davis v. Minor*, 28 Id. 325; *Bruce v. Schuyler*, 46 Id. 447; and the several notes to the above cases.

LAW WILL BE HELD VALID IF POSSIBLE: *Boisdere v. Citizens' Bank*, 29 Am. Dec. 453; *Williamson v. Williamson*, 41 Id. 636, and note; *Bruce v. Schuyler*, 46 Id. 447; *Lane v. Dorman*, 36 Id. 543, and note.

POWER OF COURTS TO DECLARE STATUTE UNCONSTITUTIONAL IS UNDOUBTED: *Flint River Steamboat Co. v. Foster*, 48 Am. Dec. 248, and note.

THE PRINCIPAL CASE HAS BEEN FOLLOWED EXTENSIVELY in the Georgia courts, and is a recognized authority upon the points which it decides: See *Lott v. Dysart*, 45 Ga. 355; *Garlick v. Robinson*, 12 Id. 340; *Peterson v. Orr*, Id. 464; *Harvill v. Lowe*, 47 Id. 215; *Henderson v. Hackney*, 23 Id. 383; *McKemri v. Campton*, 18 Id. 171; *Bivins v. Lessee*, 15 Id. 521; *Cutts v. Hardee*, 28 Id. 350; *Aycock v. Martin*, 37 Id. 124; *Wright v. Nagle*, 48 Id. 367; *Scroggins v. Hoadley*, 56 Id. 165, all citing or following the principal case.

WORTHY v. JOHNSON.

[10 GEORGIA, 368.]

STATUTE OF LIMITATIONS HAVING RUN AGAINST EXECUTOR, ADMINISTRATOR, OR OTHER TRUSTEE of the personal property of an infant, the infant is also barred.

UNAUTHORIZED SALE OF PROPERTY BY ADMINISTRATOR OF ESTATE is treated as his individual act.

TRUSTEE MAY BRING ACTION AS TRUSTEE which he would be estopped to bring in his individual capacity.

BENJAMIN P. ROBINSON and Jane Worthy, the executor and executrix of the estate of Thomas Worthy, deceased, in January, 1839, without authority of law, proceeded to sell some negroes, property of said estate. A portion of said negroes were purchased by the said executors, and the remainder by other parties. On the fourth of March, 1843, the said executors were removed by the court, and one Lucius B. Lovelace appointed administrator *de bonis non* on said estate. This action was brought by Joseph S. Worthy, a son of said deceased, who had just attained the age of twenty-one years, and the remaining complainants, being under age, were represented by him. The defendant, relying upon the statute of limitations, demurred to the bill,

and the demurrer was sustained by the lower court. Defendant excepted.

Stephens, for the plaintiff in error.

Hill and Bull, contra.

By Court, LUMPKIN, J. In *Pendergrast v. Fbley*, 8 Ga. 1, this court held, that where the title to personal property vests in an executor, administrator, or other trustee for an infant who neglects to sue within the time prescribed by law, that the statute of limitations shall bind the infant, and that the interest of the minor, under such circumstances, will not be protected by the act of 1817. Apply this principle to the case before the court.

The sale by the executor and executrix in January, 1839, being a nullity, and so declared by this court, *Worthy v. Johnson*, 8 Ga. 236, the title of the estate in the property was not divested; on the contrary, it was the right and duty of the executor and executrix to have instituted suit forthwith against the purchasers to recover the negroes. Nor would they be estopped in their trust character from maintaining the action, the law looking upon the void sale as their individual act: *Paschal, Adm'r, v. Davis*, 3 Id. 256.

The statute, therefore, run against them immediately as to so much of the property as was bought by third persons at this sale; and more than four years having elapsed from the date of the sale in January, 1839, to March, 1843, when the executor and executrix were removed from office, the bar was complete at that time as to them, and consequently, to the present complainants also, who are the legatees of Thomas Worthy, the testator.

But suppose it were otherwise, and for this breach of trust by the executor and executrix they had no right to maintain an action against the purchasers at their own sale to repair the *devastavit*, and thus avoid the responsibility by recovering the slaves against a sale that must be treated as their own because made without authority of law. In that event it is clear that the statute would commence running, as to this portion of the property, against Lucius B. Lovelace, the administrator *de bonis non*, from his appointment in March, 1843, and the bar would be complete as to him, before suit was instituted.

Whether a trustee who has converted the property of the *cestui que trust* can avoid his own wrongful acts or not, we should be reluctant to hold; we should be reluctant to hold that the only remedy in favor of creditors and distributees or legatees

was against the defaulting trustee for waste or mismanagement. But one thing is very certain: if the vendee is protected against the administrator *de bonis non*, he is equally so against those who are beneficially entitled to the property of the testator.

In June, 1843, the negroes purchased by Mrs. Worthy were sold under an individual execution against her; and in February, 1844, those bought by Robinson were sold under an individual execution against him. Lovelace qualified as administrator *de bonis non* in March, 1843, but no action was commenced until September, 1848, and then by the legatees, and not by the administrator. At that time the bar was equally full as to all that portion of the negroes bid in by the executor and executrix at their own sale, and subsequently resold to pay their private debts. Whether Lovelace has made himself personally liable for failing to sue in time, is a question we will not anticipate.

Judgment affirmed.

“THE TENDENCY OF THE DECISIONS is to support the position that when a right of action vests in an executor, guardian, or trustee, who is under no legal disability, the statute will commence to run, despite the disability of the minor, and if the claim is lost by the neglect of the representative to sue, the minor is barred:” *Moore v. Armstrong*, 36 Am. Dec. 63, and note 68, where the subject is treated of at some length, citing numerous authorities: also *Pownal v. Taylor*, 34 Id. 725, note, where the principal case is cited; *Smilie v. Biffle*, 44 Id. 156, and note.

ZEIGLER v. SCOTT.

[10 GEORGIA, 389.]

USURY—CONSTRUCTION OF ACT OF LEGISLATURE.—An act of the legislature provided that in an action at law the adverse party may be compelled to answer interrogatories upon oath; and when so answered, they may be used as evidence, as if procured upon a bill in chancery for discovery: *Held*, that in order to support the defense of usury by such answers, it is not necessary to tender the principal and legal interest.

ANSWER IN EQUITY IS CONCLUSIVE WHEN RESPONSIVE TO BILL, unless contradicted by two witnesses, or one witness and circumstances.

IF BORROWER PAYS UP AMOUNT OF USURIOUS DEBT TO LENDER, and afterwards sues to recover it back in an action for money had and received, he can only recover the usurious excess, and no more.

IN REPLY TO INTERROGATORY, INDEPENDENT CONTRACT NOT ELICITED BY interrogatory is inadmissible.

ASSUMPSIT. Plaintiff in error sued defendant upon a certain promissory note, and the defendant, pleading usury, served certain interrogatories on the plaintiff under the act of 1847. On

the trial the following facts were developed: W. S. Scott, defendant's intestate, in 1838 borrowed of plaintiff one thousand dollars, with interest at sixteen per cent. per annum, and gave his note, due December 25, 1838. At that time the note was again renewed for one year for one thousand three hundred and seventy-nine dollars and forty-two cents, and successively renewed in 1840 and 1841. Plaintiff made a further and separate loan to defendant in March, 1840, for two thousand dollars, due December 25, 1840, at sixteen per cent. This note was renewed in 1841, at the same rate. Plaintiff also sold defendant six hundred and sixty-eight dollars and forty-four cents' worth of cotton in June, 1840. In January, 1842, the parties had a settlement of their accounts, when plaintiff purchased of defendant's intestate two negro girls for one thousand three hundred dollars, which was an excessive price, but it was agreed between the parties that the excess should purge the above transactions of their usurious character. Defendant also transferred to plaintiff a note on one Colbert for seven hundred dollars. These sums of one thousand three hundred dollars and seven hundred dollars were applied to the payment of the one-thousand-dollar note of 1838, and the remainder to the payment of the two-thousand-dollar note and the price of the above cotton. A new note, at eight per cent. per annum, afterwards grew out of these transactions; and upon this note this suit was brought. The trial below resulted in a verdict for plaintiff for six hundred and three dollars and seventy-five cents, and plaintiff appealed.

Hunter and Hall, for the plaintiff in error.

Green and Culverhouse, for the defendant.

By Court, LUMPKIN, J. Our investigation in this case will be restricted to the single inquiry, whether the verdict of the jury was contrary to evidence. In other words, whether, upon any hypothesis consistent with the proof, the finding of the jury can be sustained.

In order to ascertain this satisfactorily, it becomes necessary to settle several important points of law which stand in the way.

What is the proper construction of the act of 1847, authorizing discoveries at common law? The act provides that the adverse party shall be compelled at law to answer interrogatories on his oath and affirmation, and in solemn form; and the answers when made and filed shall be evidence on the trial of the cause, "in the same manner, and to the same purpose and extent, and upon the same condition in all respects, as if the same

had been procured upon a bill in chancery for discovery, but no further or otherwise:" New Digest, 465, 466.

Under this statute it is contended, that before the answers of the plaintiff to the interrogatories can be read by the defendant, in support of his plea of usury, he must offer to pay the principal and legal interest due by him—indeed, that he impliedly consents to do this, by resorting to the conscience of the adverse party for proof.

We fully recognize the doctrine in chancery, that whenever a borrower files his bill in equity, to be relieved against a usurious contract, the court refuses relief, except upon the terms of his paying up the principal sum due and legal interest. It is based upon that corner-stone principle of the court of chancery, that he who asks equity must do equity, and in that forum it is rigorously required in all cases, notwithstanding the law may have positively declared the contract void: 1 Fonbl., b. 1, c. 1, sec. 3 h; *Fanning v. Dunham*, 5 Johns. Ch. 122 [9 Am. Dec. 283]; *Young v. Scott*, 4 Rand. 415.

It will be observed, however, that this exaction is only made where relief is sought from the illicit contract, and that it is made whether the applicant had or had not the benefit of his adversary's answer.

For, although he could prove the usury, by *aliunde* testimony, and without a discovery from the lender, still he is not entitled to relief, except upon the terms stated. It is a misapprehension, therefore, to suppose that the condition of paying up the money lent, with lawful interest, was a reward to the lender for making the discovery. It was a condition to the relief sought, and not to the discovery: See *Bosanquett v. Dashwood*, Cas. t. Talb. 38; *Brownsword v. Edwards*, 2 Ves. sen. 243, 249; *Scott v. Nesbitt*, 14 Ves. 442; *Fanning v. Dunham*, 5 Johns. Ch. 122 [9 Am. Dec. 283]. We take the act according to its obvious and literal meaning; and the legislature, neither in this statute nor that passed previously, in 1842, New Digest, 601, compelling the plaintiff to discover usury on oath, having made the payment of the money lent with lawful interest, a condition to the reading of the evidence, we do not feel at liberty to superadd it.

It will be readily perceived how much the result in this case depends upon our opinion upon this point. One of the main issues in this controversy is, whether the first note of one thousand dollars, with the usurious interest thereon, entered into and constituted a part of the consideration of the note sued on. The question is distinctly and repeatedly asked in the in-

terrogatories, and as fully and explicitly answered in the negative. Zeigler swears that this first loan, with the interest thereon, was paid off and discharged in January, 1842, by the two negroes sold to him by Scott, and the note which he let him have on Colbert; and that the first note had no connection whatever with that which is the foundation of the present action; and there is not a particle of proof contradicting this statement.

Now the statute declares that the answers to the interrogatories are to be evidence "to the same extent in all respects as if the same had been procured upon a bill in chancery for discovery." But an answer in equity is conclusive when responsive to the bill unless contradicted by two witnesses, or one witness and circumstances.

If, then, the jury arrived at the result which they did by adding this first debt of one thousand dollars to the last loan of two thousand dollars, and deducting from the aggregate the two thousand dollars paid in property and paper, and the three hundred and ninety-six dollars credited on the last note of two thousand four hundred and ninety-eight dollars—and such is not unlikely the fact—then the verdict is contrary to the evidence, and ought to be set aside; for the jury had no right to assume, in face of the proof, that any portion of the one-thousand-dollar note was left unextinguished by the settlement between the parties in January, 1842.

With these principles adjusted, how stands the case? The plaintiff lent the defendant one thousand dollars in 1838, which compounded annually, at sixteen per cent., amounted to one thousand eight hundred and sixty-three dollars and seventy-seven cents in January, 1842, the date of the settlement. The payment of two thousand dollars, made at that time, discharged this debt, and left a balance of one hundred and thirty-six dollars and twenty-three cents to go to the two thousand dollars loaned in March, 1840. This balance, and the three hundred and ninety-six dollars indorsed upon the note in suit, is all, according to the proof, that should be deducted from the two thousand dollars in the way of payments. It is true that the plaintiff admits that in addition to these some small sums were received, the amount of which he can not recollect, and they may be well set off by the blacksmith's work done by him for the defendant; add the two items together, then, of three hundred and ninety-six dollars and one hundred and thirty-six dollars and twenty-three cents, making five hundred and thirty-two dollars and twenty-three cents, and subtract the aggregate from

the two thousand dollars, and the verdict should have been for one thousand four hundred and sixty-seven dollars and seventy-three cents instead of six hundred and thirty dollars and seventy-five cents.

But the defendant pleaded, among other things, as a set-off to the plaintiff's demand, the usury paid on the first note, which amounted, as we have seen, to four hundred and thirty-one dollars and eighty-eight and one half cents. Whether the statute of limitations was replied to this plea, the record does not disclose. The final payment of usury on the first note was made in January, 1842, and the action was not brought until January, 1849, just seven years thereafter.

This affords another striking illustration of the defect in our judiciary act, which sends parties to the jury upon the written declaration and answer, all the subsequent pleadings being conducted orally. But take the most favorable view of the case for the defendant, namely, that the statute was not replied in bar of the set-off for usurious payments, and grant that the jury allowed the full amount of the usury paid, six hundred and thirty-one dollars and eighty-eight and one half cents, still the verdict should have been for one thousand and thirty-five dollars and eighty-four and one half cents; and in all these estimates I have assumed that the Colbert note amounted to seven hundred dollars, as testified to by Colbert himself, and not six hundred dollars, as stated by the plaintiff in his answers.

Of course, I only allow the defendant to recover back in his plea of set-off the usurious gain; for it is well settled, both in England and in this country, that if a borrower pays up the amount of his usurious debt to the lender, and afterwards sues to recover it back in an action for money had and received, he can only recover the usurious excess, since *ex æquo et bono*, he ought not to recover back the money really advanced and the legal interest thereon: *Fitzroy v. Gwillim*, 1 T. R. 153; *Jones v. Barkley*, 2 Doug. 697, in notes; *Dey v. Dunham*, 2 Johns. Ch. 191; *Fanning v. Dunham*, 5 Id. 146 [9 Am. Dec. 283]; *Palmer v. Lord*, 6 Id. 95; *Clarkson v. Garland*, 1 Leigh, 147.

In answer to the third interrogatory, the plaintiff sets up an agreement or understanding between the defendant and himself, to the effect that the excess of two hundred dollars in the price which he claims to have paid for the two negroes was to extinguish all the usury which he had extorted. But this portion of the answer is not elicited by the question propounded, and as the act of 1847 only allows the answer to be evidence "to the

same extent as if obtained in chancery, but no further or otherwise," we hold that it was inadmissible for the purpose of setting up this independent contract.

In addition to the two sums of one thousand dollars and two thousand dollars loaned to the defendant, the plaintiff let him have cotton on the eleventh of June, 1840, valued at six hundred and sixty-eight dollars and forty-four cents, which the plaintiff contends is still unpaid, and made up a part of the present large note; but we think the jury were warranted in finding that this indebtedness was totally extinguished. The plaintiff, among other things, was asked if he ever loaned the defendant any cotton. He denied expressly that he ever did. The defendant, on the trial, tendered in evidence a paper given by his intestate to Zeigler, on the same day on which the cotton note was dated, wherein Scott promised, on or before the first day of December next thereafter, to deliver to plaintiff, in Macon, eight thousand three hundred and fifty-five and one half pounds of ginned cotton, for value received of him, and upon the back of this receipt was an acknowledgment by the plaintiff, dated the fourth of February (the year left blank), that he had received eight thousand pounds of cotton. This writing, as well as the note, having been found in the possession of Scott, shows that he had discharged them both; and taking all the circumstances together, particularly the denial of the plaintiff that he had ever loaned Scott any cotton, we think that the jury had a right to infer that this cotton constituted the consideration of the note, and that when it was delivered in Macon, the note as well as the receipt was extinguished; that they both related to one and the same transaction.

Under the views which we have presented of the case, both upon the law and the facts, justice would seem to require that it should be remanded for another hearing. Accordingly it is so ordered.

TO DISPROVE ANSWER IN EQUITY, ONE POSITIVE WITNESS and other strong corroborating circumstances are sufficient: *Maddox v. Sullivan*, 44 Am. Dec. 234; but an unsworn answer is not evidence for any purpose: *Willis v. Henderson*, 38 Id. 120; nor does it require two witnesses or their equivalent to disprove the answer of an executrix, made upon her information and belief: *Dugan v. Gittings*, 43 Id. 306. So an answer to a bill, which is unsupported by proof, and not responsive to the bill, will be regarded as untrue: *O'Brien v. Elliott*, 32 Id. 137; and an answer setting up new matter not responsive to the bill is inadmissible: *Clark v. Flint*, 33 Id. 733.

RECOVERY OF MONEY PAID AS USURY.—The modern signification of the term "usury" is the excess over the legal rate charged to a borrower for the

use of money. Formerly all sums paid for the use of money were denominated usury, and could not be taken: *Bouv. Law Dict.*, tit. Usury. Whether money which has been paid in pursuance of a usurious agreement can be recovered, or, if so, in what manner, is a question upon which the authorities are somewhat conflicting. It has been held that the payment of usurious interest is not such a voluntary payment as will entitle the receiver to retain it; that the money is paid under the constraint of a formal though illegal contract obtained by oppression, and by taking advantage of the necessities of the borrower, and that it may be recovered back by action: *Wheaton v. Hibbard*, 11 Am. Dec. 284; *Philanthropic Build. Ass. v. McKnight*, 35 Pa. St. 470; *Schroeppel v. Corning*, 5 Denio, 236; *Ware v. Bennett*, 18 Tex. 794; *Coughman v. Drafts*, 1 Rich. Eq. 414; *Rushing v. Rhodes*, 6 Ga. 228; *Town v. Wood*, 37 Ill. 512; *Wood v. Kenny*, 19 Ind. 68; *Cowry v. Lewis*, Id. 121; *Shockley v. Shockley*, 20 Id. 108; *Hodge v. Owings*, 5 T. B. Mon. 91; *Webb v. Wilshire*, 20 Me. 406; *Pierce v. Conant*, 25 Id. 33; *Houghton v. Stowell*, 28 Id. 215; *Palen v. Johnson*, 46 Barb. 21; *West v. Meddock*, 16 Ohio St. 417; *Grow v. Albee*, 19 Vt. 540; *Willie v. Green*, 2 N. H. 333; *Inhabitants etc. v. Eaton*, 11 Mass. 368; *State Bank v. Ensminger*, 7 Blackf. 105; *Fay v. Lovejoy*, 20 Wis. 403; *Bond v. Jones*, 8 Smed. & M. 368; *National Bank v. Lewis*, 81 N. Y. 15; nor does the debtor need to pay the usury and then sue to recover it back; he may defend *pro tanto*: *Root v. Pinney*, 11 Wis. 84; and a sealed release, "in full settlement and payment of all extra or unlawful interest," executed at the time the money was loaned, and a part of the transaction of borrowing, is not a bar to a recovery of the usury: *Herrick v. Dean*, 54 Vt. 568. So a claim for money taken as usury, while a law forbidding usury was in force, is not destroyed by a repeal of the law: *Whittaker v. Pope*, 2 Wood, 463. This right to recover back usurious interest is a common-law right, and statutory regulations are merely cumulative: *Palmer v. Lord*, 6 Johns. Ch. 95; *Porter v. Mount*, 41 Barb. 561; and *indebitatus assumpsit* would be the proper form of action: *Whittaker v. Pope*, 2 Wood, 463. See also *Brown v. McIntosh*, 39 N. J. L. 22. But the money must have been paid upon a loan for which the debtor was legally liable to the creditor: *Holmes v. Gerry*, 55 Me. 299. So a surety who has paid the debt can not recover the money so paid from his principal, but he may from the creditor to whom he has paid it: *Whitehead v. Peck*, 1 Ga. 140; *Kirkpatrick v. Wherrett*, 7 B. Mon. 388.

BUT IT HAS BEEN HELD THAT MONEY PAID AS USURY CAN NOT BE RECOVERED BACK: *Manny v. Stockton*, 34 Ill. 306; *Tompkins v. Hill*, 28 Id. 519; *Carter v. Moses*, 39 Id. 539; *Smith v. Coopers*, 9 Iowa, 376; *Nichols v. Skool*, 12 Id. 300; *Reid v. Duncan*, 1 La. Ann. 265; *Farwell v. Meyer*, 35 Ill. 41; *Spurlin v. Millikin*, 16 La. Ann. 217; *Shelton v. Gill*, 11 Ohio, 417, where the court said: "The interest, excessive as it was, was paid; and whether we place the case upon the ground of an executed contract, or as one which is against sound morals, or *malum prohibitum*, and the parties therefore in *pari delicto*, we know of no principle by which it can be recovered back;" *Graham v. Cooper*, 17 Id. 605; *Woolfolk v. Bird*, 22 Minn. 341; *Williamson v. Cole*, 26 Ohio St. 207; *Latham v. The Wash. B. & L. A.*, 77 N. C. 145, where the court held that the parties were in *pari delicto*, and that therefore the plaintiff was not entitled to relief; *Hargrave v. Lewis*, 3 Ga. 162; *Jones v. Joyner*, 8 Id. 562; *Broadwell v. Lair*, 10 B. Mon. 220; *Butterworth v. O'Brien*, 23 N. Y. 275; S. C., 28 Barb. 187; *Merchants' Bank v. Lutterloh*, 81 N. C. 142; *Perkins v. Conant*, 39 Ill. 184. A number of the above decisions turn upon statutory provisions or construction, and the better opinion seems

to be, that in the absence of a statutory prohibition, money which has been paid in pursuance of a usurious agreement can be recovered by the party paying it, in an action for money had and received, or of *indebitatus assumpsit*.

MONEY PAID AS USURY MAY BE SET OFF AGAINST PRINCIPAL; and in cases where it could not be recovered in an independent action, it will be considered as having been extorted by means of the debt, and will be applied as part payment of the same: *Farwell v. Meyer*, 35 Ill. 41; *Threadgill v. Timberlake*, 2 Head, 395, where the court lays it down as a rule of equity to apply all usurious payments to the principal until it is paid, when the remainder can be recovered as so much money had and received; *Fox v. Taliaferro*, 4 Munf. 243; *Parmalee v. Lawrence*, 44 Ill. 405; *Wood v. Lake*, 12 Wis. 84, which is a strong and well-considered case, and maintains that a party, independent of any statute, has his common-law remedy for the recovery of usury, and if sued by the lender he may set off against his claim the excessive interest so paid; *Bartlow v. Bond*, 3 Dana, 591; *Wood v. Gray*, 5 B. Mon. 92; *Booker v. Gregory*, 7 Id. 439; *Clark v. Hunter*, 2 Spears, 83; *Harp v. Chandler*, 1 Strobb. 461; *Hass v. Flint*, 8 Blackf. 67. But where separate security has been given for the principal and the interest, and usurious interest has been paid, it can be sued for and recovered in an independent action: *Nichols v. Bellows*, 22 Vt. 581.

PARTY AGAINST WHOM JUDGMENT HAS BEEN OBTAINED for principal with usurious interest can not afterwards recover back the usurious excess in an action at law, as the judgment operates as an estoppel: *Schroepfel v. Corning*, 10 Barb. 576; *Thompson v. Ware*, 8 B. Mon. 26; *Hopkins v. West*, 83 Pa. St. 109; *McDonald v. Smith*, 53 Vt. 33; *Day v. Cummings*, 19 Id. 496; *Moseley v. Smith*, 21 Tex. 441. The ground upon which the above decisions have been based is that the party should have interposed his defense of usury in bar to the judgment, and that having failed to do so, he is barred by his neglect. But in such cases the party may find relief in equity, which will sometimes decree its return: *Lawless v. Blakely*, 4 T. B. Mon. 488; *Thompson v. Ware*, 8 B. Mon. 26; *Pearce v. Hedrick*, 3 Litt. 109; *Dooly v. Stipp*, 26 Ill. 86; *Doub v. Barnes*, 1 Md. Ch. 127; *Bartholomew v. Yaw*, 1 Clarke (N. Y.), 16. So where the facts and circumstances charged and admitted make out usury, and afford matter proper for an account, equity has jurisdiction: *Weatherhead v. Boyers*, 7 Yerg. 545; *Conner v. Myers*, 7 Blackf. 337; *Clarkson v. Garland*, 1 Leigh, 162; *Fay v. Lovejoy*, 20 Wis. 403. But in *Pitts v. Cable*, 44 Ill. 103, the court held that there was no remedy for a person who had paid usurious interest, either in law or in equity. A court of equity will not retain a bill on the part of the lender to recover money lent upon a usurious contract: *Morrison v. Helm*, 4 Bibb, 460; nor can a party recover any part of the usurious interest if it would leave any part of the principal debt unpaid; it must be applied to the payment of the said principal: *Hawkins v. Welch*, 8 Mo. 490.

SYKES v. McROBY.

[10 GEORGIA, 465.]

ONLY JUDICIAL DEPARTMENT OF STATE IS CLOTHED WITH POWER TO INVESTIGATE ANTAGONISTIC CLAIMS of contending parties, and consequently an order of the executive correcting a grant, after the rights of third parties have intervened, is inoperative and void.

GRANT CAN NOT BE IMPEACHED IN COLLATERAL WAY AT LAW, by showing that the grantee named in the grant was not the one intended; it should be first corrected by a *sci. fa.* or other proceeding in chancery.

EJECTMENT brought by defendant in error against plaintiff in error as tenant in possession. Plaintiff offered in evidence a grant from the state to Rachael McRory for the disputed premises. In said grant the name of the grantee had been changed from McCrary to McRory. Plaintiff also offered in evidence an order of the governor, issued by virtue of the act of 1827, authorizing said change. Defendant produced in evidence a copy of the original grant as uncorrected, by which the state conveyed to Rachael McCrary the land in dispute, dated November 21, 1823, and a power of attorney from Rachael McCrary to one Freeland, dated January 21, 1824, and a deed executed by said attorney. He also established his succession from said last-mentioned grantee. Plaintiff obtained judgment, and defendant took this appeal.

Doyal and Nolan, and Calhoun, for the plaintiff in error.

Ezzard, for the defendant.

By Court, LUMPKIN, J. In *Hilliard v. Connelly*, 7 Ga. 172, this court held, that the act of 1837, authorizing and requiring the governor and the secretary of state and the comptroller general to correct errors in grants, and to issue *alias* grants, was unconstitutional, so far as the rights of third persons, other than the state and the original grantee, were concerned.

The executive order tendered in evidence on the trial, correcting the supposed mistake in the name of the grantee, bears date in 1839, while the record shows that two years previous to that time, to wit, in 1837, Wilkinson and Fowler, two of the immediate grantors of Sykes, the tenant in possession, had acquired a title to the land in dispute from Freeland, the attorney in fact of Rachael McCrary, in whose name the grant originally issued. The order, therefore, of the executive, altering the grant, was clearly inoperative and void, and inadmissible in evidence, the rights of third persons other than the original grantee having attached. The judiciary department alone of the state government was clothed with authority to investigate and determine the antagonistic claims of the contending parties.

But it is argued in behalf of the defendant in error, that this is a case of latent ambiguity, and that, conceding the invalidity of the executive order, that still it was competent, by parol proof on the trial of the ejectment, to ascertain the true grantee

and to show that Rachael McCrory, under whom the plaintiff claims, and not Rachael McCrary, from whom the defendant derives title, was the right person to whom the grant should have issued, and there is authority to sustain this position: *Cheyney's Case*, 5 Co. 68; Co. Litt. 8 a; *Ulrich v. Litchfield*, 2 Atk. 373; *Parsons v. Parsons*, 1 Ves. jun. 266; *Thomas v. Thomas*, 6 T. R. 671; *Jackson v. Stanley*, 10 Johns. 132 [6 Am. Dec. 819]; *Jackson v. Cody*, 9 Cow. 140.

But we think the better practice is, that a grant issued by mistake should only be avoided by *sci. fa.*, or other proceedings for that purpose in chancery; and that it can not be impeached in this collateral way at law, by showing that the grantee intended was a different person from the one mentioned in the grant: *Jackson v. Hart*, 12 Johns. 77 [7 Am. Dec. 280]; *Hilliard v. Connelly*, 7 Ga. 172; 2 T. R. 684 [miscited]; *Witherington v. McDonald*, 1 Hen. & M. 306 [3 Am. Dec. 603]; *Norvell v. Camm*, 6 Munf. 238 [8 Am. Dec. 744]; *Polk v. Wendal*, 9 Cranch, 87, 94; S. C., 5 Wheat. 293; *Bagnell v. Broderick*, 18 Pet. 436.

Let the judgment below, for these reasons, be reversed.

LEGISLATURE CAN NOT EXERCISE JUDICIAL POWERS: *Lane v. Dorman*, 36 Am. Dec. 543, and note; and when the legislature goes beyond the powers delegated to it by law, its acts are absolutely void: *Taylor v. Porter*, 40 Id. 274, and note; *Hawkins v. Governor*, 33 Id. 346.

THE PRINCIPAL CASE IS CITED in *Henderson v. Hackney*, 23 Ga. 383, where the court held parol evidence competent and admissible to show that the name Elias Nicks and Eli Nicks meant the same person; and in *Walker v. Wells*, 25 Id. 141; in each of which cases the court expressed its opinion that the principal case held an erroneous doctrine. The case was approved and followed on that point in *Tison v. Yawn*, 15 Id. 491.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

PIERCE v. CARLETON.

[12 ILLINOIS, 353.]

GARNISHEE MAY INQUIRE INTO JURISDICTION OF COURT RENDERING JUDGMENT against defendant in attachment, in a proceeding on writ of error to reverse the judgment pronounced against himself, and if that court had no jurisdiction, the judgment against the garnishee will be reversed.

GARNISHEE WILL NOT BE PROTECTED IN PAYMENT OF JUDGMENT against himself based on void proceedings against the defendant in attachment.

JUDGMENT AGAINST DEFENDANT IN ATTACHMENT BY COURT HAVING JURISDICTION can not be attacked by the garnishee, for he is protected by such judgment, but only by the defendant in a direct proceeding for the purpose.

WHEN CERTIFICATE OF PUBLICATION OF NOTICE OF PENDENCY OF ATTACHMENT shows that the notice was published in due time, in a certain newspaper, it may be shown by parol that the signature thereto is that of the publishers of the newspaper, and that the newspaper is published at the place required by law; and the appellate court will presume that this was done to the satisfaction of the lower court.

SURPLUS BELONGING TO DEFENDANT AND IN HANDS OF OFFICER after satisfaction of execution may be reached by garnishment.

ANSWER OF GARNISHEE IS DEEMED TRUE until disproved or contradicted. **JUDGMENT MUST NOT BE GIVEN ON ANSWER OF GARNISHEE**, unless it clearly makes him chargeable.

ASSUMPSIT was commenced and attachment issued by Carleton & Company against George Cribb, a non-resident. The writ also issued against Pierce, a deputy United States marshal for the district of Illinois, as garnishee. Pierce had previously levied upon and sold certain goods as the property of Cribb under two executions against him. These executions had been satisfied, leaving a surplus in Pierce's hands; and it is against this surplus

that the garnishment is directed. Judgment was rendered in favor of Carleton & Company and against Cribb. And at the next following term judgment was rendered against Pierce, ordering him to pay Carleton & Company the surplus in his hands. The remaining facts are stated in the opinion.

E. S. Leland and M. Y. Johnson, for the appellant.

R. S. Blackwell, for the appellee.

By Court, TREAT, C. J. The first question arising on this record is, whether a garnishee, who sues out a writ of error to reverse a judgment rendered against him, may inquire into the legality and regularity of the previous proceedings against the defendant in attachment. In one respect, he unquestionably can. In a suit by attachment, the court must acquire jurisdiction, and proceed to enter a judgment against the defendant, before it can pronounce any judgment against a party summoned as garnishee. If the previous proceedings are unauthorized and void, there is no sufficient basis to support the judgment against the garnishee. He would not be protected in the payment of a judgment obtained under such circumstances. It would be regarded as a voluntary and not a compulsory payment, and the defendant might compel him to pay a second time. It is clear, therefore, that a garnishee should be permitted to inquire into the validity of the previous proceedings in the case. If such proceedings are void, the judgment against the garnishee may for that cause be reversed on error. But if the court had jurisdiction, its errors and irregularities can only be called in question by the defendant, and that too in a direct proceeding for the purpose. They affect him only, and he may waive or insist on them. The garnishee has no cause to complain, for he will be protected in the payment of the judgment: *Whitehead v. Henderson*, 4 Smed. & M. 704; *Matheny v. Galloway*, 12 Id. 475; *St. Louis etc. Insurance Co. v. Cohen*, 9 Mo. 421.

In this case, the garnishee assigns for error that no notice of the pendency of the attachment was given to the defendant. Waiving any discussion of the question whether the publication of notice is necessary to confer jurisdiction on the court in proceedings by attachment, it is enough for the decision of this case, that it sufficiently appears from the record that the requisite notice was given. The record states that the plaintiffs filed proof of publication, and then follows a notice in due form, with a certificate of Houghton & Springer attached, in which they state that the notice was published in the North Western Gazette,

for four weeks consecutively, the first publication being on the twentieth of March, 1850. The judgment against the defendant was entered on the twentieth of May, so that sixty days intervened between the first insertion of the notice and the date of the judgment. It is true that Houghton & Springer do not describe themselves in the certificate as publishers or printers of the Gazette, nor do they state where the paper was published. But it was clearly competent for the plaintiffs to prove by parol that the paper was published in the state, and that Houghton & Springer were the publishers thereof. The presumption should be indulged, that this was done to the satisfaction of the court.

The record also presents the question, whether moneys remaining in the hands of an officer after the satisfaction of the execution against the defendant in attachment can be reached by the process of garnishment. The statute is very broad in its provisions. It provides that the lands, tenements, goods, chattels, rights, credits, moneys, and effects of the debtor, of every kind, in whosoever hands or possession the same may be found, may be reached by attachment. This court decided in the case of *Reddick v. Smith*, 3 Scam. 451, that money in the hands of a sheriff, collected on execution, can not be attached as the property of the plaintiff in the execution, because the money is in the custody of the law, and subject to the control of the court from which the execution emanates; and because to allow it to be done might bring different tribunals into collision, and cause much embarrassment to officers concerned in the execution of final process. We adhere to that decision, but we are not inclined to extend the rule to cases like the present. The same reasons do not apply to a case where an execution has been satisfied, and there is a surplus in the hands of the officer belonging to the defendant. The command of the writ does not require the officer to bring the surplus into court. When the amount due on the judgment is returned into court, or paid over to the plaintiff, the execution has accomplished its office, and if there is any surplus, it is the duty of the officer to pay it over to the defendant. It is not strictly in the custody of the law, but the officer holds it as so much money had and received to the use of the defendant. Courts do not resume any control over a surplus, except under peculiar circumstances, as in the case of *Van Nest v. Yeomans*, 1 Wend. 87, where, on a sale of real estate under a senior execution, the court directed the sheriff to pay the surplus to a junior judgment creditor having a lien on the same property:

See *Fieldhouse v. Croft*, 4 East, 510; *Jaquet's Adm'rs v. Palmer*, 2 Harr. (Del.) 144.

The remaining question relates to the correctness of the judgment against the garnishee. The answer of a garnishee, until disproved or contradicted, must be considered as true. If the plaintiff declines to put it in issue, but asks for judgment thereon, the answer ought clearly to disclose a state of facts on which the garnishee is chargeable. In such case, if the answer leaves it doubtful whether the garnishee is indebted to the defendant, he should be discharged. Judgment should not be entered against him, where there is reason to believe that he may be compelled to pay the same demand to another party.

It is insisted that the answer of the garnishee did not authorize a judgment against him. He states in substance, that, as deputy marshal, he received two executions against the defendant, and levied the same on a lot of merchandise in the possession of Campbell; that the goods were claimed by Robinson, and on a trial of the right of property, a verdict was returned against the claimant, on the ground that the executions were a lien on the goods before they came to the possession of the claimant; that he thereupon proceeded to sell so much of the goods as he supposed would be sufficient to discharge the executions, but there was found to be a surplus in his hands, which is the foundation of the judgment in question. It might, perhaps, be inferred from the answer, that Robinson was entitled to the surplus. The case, however, shows that the residue of the goods levied on by the garnishee were attached in this case as the property of the defendant; that Robinson interpleaded, claiming them as his, and that the right of property was adjudged against him. The case further shows that Robinson subsequently came into court, and released on the record all claim to the goods attached and their proceeds. It is evident from the whole case, that his claim, whatever it was, was the same as to all of the goods. The right of property, as well in the goods sold by the marshal as those levied on in this case, was determined against him; and if he was not entitled to the goods as against the attaching creditor, he certainly was not entitled to the surplus, for that was but the proceeds of a portion of the same goods.

The judgment is affirmed.

Judgment affirmed.

JUDGMENT AGAINST GARNISHEE IS PRIMA FACIE BAR to subsequent recovery of the same debt by any person: *Sessions v. Stevens*, 46 Am. Dec. 339, and note on judgments against garnishees, 341. The principal case is cited

in *Schoppenhaet v. Bollman*, 21 Ind. 285, to the point that a garnishee can inquire into proceedings taken against the defendant only as far as the question of jurisdiction is concerned; and when that has attached, he has no further right to interfere.

MONEY COLLECTED BY SHERIFF ON EXECUTION can not be attached by a creditor of the plaintiff in execution: *Marvin v. Hawley*, 43 Am. Dec. 547, and cases cited in note. See *Hurlburt v. Hicks*, 44 Id. 329. The principal case is cited to the point that the surplus in the hands of the sheriff, after satisfying the plaintiff's execution, is liable to garnishee process, in *Lightner v. Steinagel*, 33 Ill. 516; *Weaver v. Davis*, 47 Id. 237; *Triebel v. Colburn*, 64 Id. 377. In *Millison v. Fisk*, 43 Id. 117, it is held that while the money collected is still in the custody of the law in the sheriff's hands, it is not liable to be garnished for a debt owing by the plaintiff in execution, and the principal case is distinguished.

WHERE NO ISSUE IS MADE UPON ANSWER OF GARNISHEE, unless it clearly makes him chargeable, he should be discharged. The principal case is cited to this point, in *People v. Johnson*, 14 Ill. 343; *Cairo etc. R. Co. v. Hindman & Co.*, 85 Id. 523; *Meadowcroft v. Agnew*, 89 Id. 473. Garnishee's answer, stating facts showing indebtedness, sufficiently admits it to authorized judgment against him, although there be no express admission of the fact: *Mann v. Buford*, 37 Am. Dec. 691.

THAT PAPER IN WHICH NOTICE OF ATTACHMENT WAS PUBLISHED was published in the state, and that the signature to the certificate is that of the publishers of the paper, may be shown by parol, and it will be presumed that this was done unless the contrary appears. The principal case is cited to this effect, in *Pile v. McBratney*, 15 Ill. 318; *Haywood v. Collins*, 60 Id. 343. Where a statute provides that proof of service of notice shall be made by affidavit, a return by sheriff that he has "executed" such notice is insufficient. The statute must be strictly pursued: *Newby v. Perkins*, 25 Am. Dec. 160.

WILCOXON v. MCGHEE.

[12 ILLINOIS, 381.]

GRANTS BY GOVERNMENT ARE CONSTRUED FAVORABLY FOR GRANTOR, and pass nothing by implication.

GRANT OF LAND BY GOVERNMENT DOES NOT PASS RIGHT OF OVERFLOWING adjoining government lands by maintaining a dam on the land granted, though the dam was on the land at the time of the grant.

GRANT OF PUBLIC LAND HAVING FIXED AND DEFINITE DESCRIPTION passes nothing but what is included within the boundaries expressed in the patent, or is naturally or necessarily annexed to the land.

APPURTENANCE MUST AGREE IN NATURE AND QUALITY with that whereunto it is appurtenant.

EASEMENT OF OVERFLOWING ADJOINING LANDS is not appurtenant to land, but more properly appertains to something put upon land, as a mill.

RIGHT TO CONTINUE TO OVERFLOW LANDS OF GRANTOR to same extent as when grant was made passes with grant of mill and appurtenances, but not with a grant of the land.

THIS was an action on the case by McGhee against Wilcoxon for damages incurred by the overflowing of plaintiff's land, caused by defendant's maintaining a dam. Plaintiff had purchased his land from the United States. The defense was that defendant had purchased his land, on which the dam was erected, from the United States prior to plaintiff's purchase of the land overflowed, which at that time also belonged to the government; that the dam and mill were erected on defendant's land at the time of defendant's purchase; and that defendant's land and the land subsequently purchased by the plaintiff were at that time both overflowed; that defendant's purchase of the land had included all the rights, privileges, immunities, and appurtenances thereto belonging; that plaintiff's subsequent purchase of the overflowed land had been made with notice of these facts. Plaintiff's demurrer to these special pleas of defendant was sustained, and defendant appealed.

M. P. Sweet, for the appellant.

Thomas J. Turner, for the appellee.

By Court, TRUMBULL, J. This case presents the single question of the right of a purchaser of a tract of public land, having upon it at the time of purchase a mill and dam, which cause the water of a stream running through it to flow back upon other public lands, to continue the dam so as to overflow such other lands after they have been entered by individuals.

It does not appear from the record that the person entering the land upon which the mill stood paid anything additional on account of the mill, or for the privilege of flooding other lands; but he made the entry and received a patent in the usual form. The manner in which the public lands are disposed of, the character of the parties to the grant, and its subject-matter, are all circumstances proper for consideration in arriving at the intention of the parties; and when we look to these circumstances, there can be little difficulty in determining what rights are acquired by a patentee of public land, especially when it is recollected that grants by the government are construed favorably for the grantor, and pass nothing by implication: 2 Bla. Com. 847; 5 Cru. Dig., tit. King's Grant, sec. 25 et seq.; *United States v. Arredondo*, 6 Pet. 738; *Charles River Bridge v. Warren Bridge*, 11 Id. 545.

Although the general government in its liberality permits a person to enter upon and subsequently to purchase a tract of public land at the minimum price, yet it could never have been

its intention, in granting this favor, to bestow also upon the settler the privilege perpetually to inundate and render valueless other tracts of public land, by damming up a stream running through the one which he might eventually purchase. The purchaser under such circumstances pays nothing for the privilege of overflowing other lands; it is not a right necessarily or naturally appertaining to the land he purchases, and could never be presumed to have entered into the contemplation of the government in making the grant.

The subject-matter of the grant is the land, having a fixed and definite description, and nothing passes as parcel of the granted premises but what is included within the boundaries expressed in the patent, or is naturally or necessarily annexed to the land: *Grant v. Chase*, 17 Mass. 443 [9 Am. Dec. 161]; *Manning v. Smith*, 6 Conn. 289.

Regularly, "nothing can be appendant or appurtenant unless it agree in nature and quality with the thing whereunto it is appendant or appurtenant:" Bac. Abr., tit. Grants, 1, 4. The right to overflow adjoining lands is not an appurtenance agreeing in nature or quality with land itself, and though perhaps a convenience, is not absolutely necessary to the enjoyment of the land; but such an easement more properly appertains to something that has been put upon the land, as in this instance, to the mill.

In the case of the conveyance of a mill and its appurtenances, and where the subject-matter of the conveyance and principal thing granted is the mill, the right to continue to overflow the lands of the grantor, to the same extent as when the grant was made, would pass with the mill, as necessary to its use and enjoyment; but here the subject-matter of the grant was the land, and the right to overflow adjoining lands belonging to the government was not an appurtenance annexed to it by any natural or legal necessity.

Let the judgment be affirmed.

Judgment affirmed.

GOVERNMENT GRANTS—CONSTRUCTION FAVORABLE TO GRANTOR.—The contrary is held in *Middleton v. Pritchard*, 38 Am. Dec. 112. Patent should be so construed as to reconcile all its parts, and to give effect to every word in it if possible: *Budd v. Brooks*, 43 Id. 321, and cases cited in the note. Title derived from the government is no better than title derived from an individual owning the fee: *Rogers v. Brent*, 51 Ill. 422. In *Hadden v. Shoutz*, 15 Id. 582, the principal case is cited to the point that in construing a government grant the court will consider the state of things in view of the parties at the time it was made.

RIGHT TO LAND COVERED BY WATER POWER PASSES BY CONVEYANCE of a mill with its appurtenances: *Swartz v. Swartz*, 45 Am. Dec. 697, and cases cited in the note thereto. The principal case is cited to this effect in *Bliss v. Kennedy*, 43 Ill. 71.

BALLANCE v. RANKIN.

[12 ILLINOIS, 420.]

IN EJECTMENT PLAINTIFF CAN NOT RECOVER DIFFERENT ESTATE FROM THAT CLAIMED in his declaration, under the Illinois statute.

PLAINTIFF IN EJECTMENT CLAIMING WHOLE OF PREMISES can not recover undivided interest therein, under the Illinois statute.

PLAINTIFF IN EJECTMENT CLAIMING UNDIVIDED SHARE can not recover different share, under the Illinois statute.

PLAINTIFF IN EJECTMENT DECLARING FOR WHOLE, may recover distinct part, under the Illinois statute.

PLAINTIFF IN EJECTMENT DECLARING FOR UNDIVIDED SHARE may recover same share in any part of the premises, under the Illinois statute.

STATE ADOPTING STATUTE OF ANOTHER STATE, which has already received a known and definite construction in its courts, is presumed to adopt the construction thus given.

THIS was an action of ejectment. The case is sufficiently stated in the opinion.

C. Ballance, in propria persona, for the appellant.

N. H. Purple, for the appellee.

By Court, TREAT, C. J. This was an action of ejectment brought by Rankin against Ballance, for the recovery of a lot of ground in the city of Peoria, covered by French claim twenty-nine. The plaintiff in his declaration claimed the whole lot in fee. On the trial, the defendant asked the court to charge the jury that the plaintiff, having declared for the whole premises, could not recover an undivided interest therein. The instruction was refused, and the defendant excepted. The plaintiff obtained a verdict and judgment for one undivided fourth part of the premises claimed.

Did the court err in refusing to charge the jury as requested? The answer must depend upon the construction to be given to the thirty-sixth chapter of the revised statutes. The seventh section, after prescribing the general form of the declaration in ejectment, declares: "If such plaintiff claims any undivided share or interest in any premise, he shall state the same particularly in such declaration." The eighth section provides: "If the action be brought for the recovery of dower, the declaration

shall state that the plaintiff was possessed of the one undivided third part of the premises, as her reasonable dower, as widow of her husband, naming him. In every other case the plaintiff shall state whether he claims in fee, or whether he claims for his own life, or the life of another, or for a term of years, specifying such life or the duration of such term." It was evidently the design of the legislature to require the plaintiff in ejectment to set forth specially in his declaration the nature and extent of the estate claimed to be recorded. The language of the statute is plain and explicit. It admits of but a single meaning. It is imperative, and not directory. These provisions were made for some substantial and practical purpose. And they are founded on very good reasons. The declaration apprises the defendant of the precise character of the estate sought to be recovered against him. If he finds that he can not successfully resist the claim, he may let judgment pass by default, and thus save the expense and trouble of further litigation. Or if he chooses to make a defense, he has only to come prepared to meet and resist a particular and not a general claim. But if the statute is to be regarded as directory merely, and the plaintiff is not bound by the averment in his declaration, these provisions will become wholly inoperative, and cease to answer any useful or practical purpose.

The plaintiff will declare generally in all cases, and a contest will be unavoidable whenever he is not entitled to an estate in fee in the whole of the premises described in the declaration. We hold that the plaintiff is bound by his allegations. He must recover according to the case made in his declaration. He can not recover a different estate than the one he claims. If he claims an estate in fee, he can not recover a less estate. If he claims an estate for life, he can not recover an estate in fee or for years. If he claims an estate for years, he can not recover an estate for life or in fee. If he demands the whole of the premises, he can not recover an undivided interest therein. If he demands an undivided share, he can not recover a different share. But if he declares for the whole premises, he may recover any distinct part or parcel thereof. And if he declares for an undivided share, he may recover the same share in any part of the premises. This construction will give effect to all of the provisions of the statute, and, as we believe, carry out the clear intentions of the legislature. Nor can any inconvenience or injustice result to the parties. The plaintiff may provide against any variance between the allegations and the proofs,

by inserting several counts in his declaration. This is expressly authorized by the ninth section. He may thus anticipate any state of case likely to arise on the trial, and avoid the effects of a variance. And the defendant may put in issue one or all of the counts of the declaration.

Our statute concerning ejectment is substantially a transcript of the New York statute on the same subject, which has been in force in that state for many years. It is a safe rule, in the interpretation of statutes, that where one state adopts a statute of another state which has already received a known and definite construction in its courts, it is presumed to adopt the construction thus given. It was contended on the argument that this principle is strictly applicable to this statute. But the position is not sustainable. The New York statute has not as yet received any fixed and uniform construction. The opinions of her courts on the question now under consideration have been fluctuating and conflicting; and we are, therefore, left to settle the question upon the statute itself, without the aid of judicial exposition.

This will be very apparent from a brief reference to the decisions in New York, bearing on this subject. In *Harrison v. Stevens*, 12 Wend. 170, the court held that the plaintiff might recover an undivided share, although in his declaration he claimed the whole of the premises. In *Holmes v. Seely*, 17 Id. 75, the case of *Harrison v. Stevens* is questioned; and the court intimate the true rule to be, that where the plaintiff claims the whole premises, he can not recover an undivided interest; and so where he claims an undivided half, he can not recover an undivided third, or fourth, or the whole. In *Hinman v. Booth*, 21 Id. 267, the court held, that where the declaration is for a moiety, and the verdict for a fourth, the plaintiff may amend his declaration to correspond with the proof. In *Gillett v. Stanley*, 1 Hill (N. Y.), 121, the court lay down the rule that, under a declaration claiming the entire interest in certain premises, the plaintiff can not recover an undivided share. In *Cole v. Irvine*, 6 Id. 634, where the declaration was for an undivided half, and the proof showed that the plaintiff was entitled to but two sevenths, it was considered a fatal variance. In *Truax v. Thorn*, 2 Barb. 156, the court refused to set aside a verdict for the plaintiff for an undivided third part of premises, on a declaration claiming four undivided ninths. The cases seem to agree that, under the peculiar system of amendments in that state, the plaintiff may avoid the effects of a variance, by amend-

ing his declaration after verdict, so as to correspond with the proof on the trial. But the doctrine of amendments has never been carried to such an extent in this state. It is proper to add, that the point in question remains wholly undetermined by the highest tribunal in New York—the court of appeals.

The judgment is reversed, and the cause remanded.
Judgment reversed.

RECOVERY IN EJECTMENT OF PART UNDER CLAIM FOR WHOLE.—It is said by Mr. Cole, in his work on the law of ejectment, after the passage of the common-law procedure act of 1852, at page 86: "It always was and still is necessary to claim enough to cover and include everything which the claimant seeks to recover. There is little if any harm in claiming too much, but great prejudice may arise from claiming too little, or from omitting anything which ought to be specially named; because, although the claimant may recover less, he can not recover more, than he has claimed:" See *Den d. Burges v. Purvis*, 1 Burr. 326; *Guy v. Rand*, 1 Cro. Eliz. 12; *Gamble v. Daugherty*, 71 Mo. 599; *Davis v. Whitesides*, 1 Bibb, 510; *Scott v. Bealle*, 1 A. K. Marsh. 69.

UNDER CLAIM FOR WHOLE OF PREMISES DISTINCT SEPARABLE PART MAY BE RECOVERED.—Under the old form of the action of ejectment, with the fictions of lease, entry, and ouster, or under the reformed action, the plaintiff or lessor of the plaintiff, as the case may be, has always been allowed to recover, under a claim for the whole of the premises, any distinct or separable part thereof to which he proves title: *Goodtitle d. Chester v. Alker*, 1 Burr. 133; *Guy v. Rand*, 1 Cro. Eliz. 12; *Doe d. Bowman v. Lewis*, 13 Mee. & W. 241; *Barclay v. Howell's Lessee*, 6 Pet. 498; *White v. St. Guirons*, Minor, 331; *Roche v. Campbell*, 4 Col. 254; *Everett v. Lusk*, 19 Kan. 195; *Davis v. Whitesides*, 1 Bibb, 510; *Bowles v. Sharp*, 4 Id. 550; *Scott v. Bealle*, 1 A. K. Marsh. 69; *Berry v. Willett*, 2 Har. & M. 376; *Thomas v. Orrell*, 5 Ired. L. 569; *Lenoir v. South*, 10 Id. 237; *Underwood v. Jackson*, 1 Wend. 95; *Treon v. Emerick*, 6 Ohio, 391; *Kelly v. Hare*, 1 Humph. 163; *Chapin v. Scott*, 1 D. Chip. 41; *Clay v. White*, 1 Munf. 162. Under a claim of one acre, two or more distinct pieces not exceeding altogether the one acre claimed may be recovered: *Goodtitle d. Chester v. Alker*, 1 Burr. 133; see *Guy v. Rand*, 1 Cro. Eliz. 12. The plaintiff may recover that part of the property claimed of which the defendant is in possession: *White v. St. Guirons*, Minor, 331; *Kelly v. Hare*, 1 Humph. 163; *Thomas v. Orrell*, 5 Ired. L. 569. This general principle of the right of the plaintiff to recover a distinct part under a claim for the whole has never been denied, even in those decisions that hold, in accordance with their construction of statutes in relation to ejectment, that an undivided interest can not be recovered under a claim for the whole property: See the principal case; *Holmes v. Seely*, 17 Wend. 75, 80; *Carroll v. Norwood*, 5 Har. & J. 155, 174. The plaintiff may declare for an indefinite number of tracts of land and recover those tracts to which he proves title: *Richardson v. Williams*, 37 Ark. 542; *Fite v. Doe*, 1 Blackf. 127; *Huggins v. Ketchum*, 4 Dev. & B. L. 414; *Mower v. Mower*, 20 Wend. 635. And in a state where under the code those parts of the complaint which are not denied or replied to are taken to be true, when defendant's answer was silent as to one of several tracts claimed in the complaint, the plaintiff was entitled to judgment for that tract: *Richardson v. Williams*, 37 Ark. 542. By 15 & 16 Vict., c. 76, sec. 180, the question at the trial is de-

clared to be whether the statement in the writ of the title of the claimants is true or false, and if true, then which of the claimants is entitled, and whether to the whole or part, and if to part, then to which part of the property in question.

UNDIVIDED INTEREST MAY BE RECOVERED UNDER CLAIM FOR WHOLE.— Under a count claiming the whole of the property, a co-tenant or coparcener may recover such undivided interest in the property claimed as he shows title to: *Doe d. Rowlanston v. Wainwright*, 5 Ad. & El. 520; *Doe d. Hellyer v. King*, 6 Exch. 791; *Doe d. Bryant v. Wipple*, 1 Esp. 360; *Doe d. Coyle Clerk v. Cole*, 6 Car. & P. 359; *Den d. Bowyer v. Judge*, 11 East, 288; *Doe d. Raper v. Lonsdale*, 12 Id. 39; *Lewis v. McFarland*, 9 Cranch, 151; *Jones v. Walker*, 47 Ala. 175; *Sawyer v. Fitts*, 2 Port. 9; *Doe d. Moore v. Abernathy*, 7 Blackf. 442; *Hughes v. Holliday*, 3 G. Greene, 30; *Davis v. Whitesides*, 1 Bibb, 510; *Todd v. McGee*, 2 Id. 350; *Gist v. Robinet*, 3 Id. 2; *Ward v. Harrison*, Id. 304; *Dickerson v. Talbot*, 14 B. Mon. 49; *Gray v. Givens*, 26 Mo. 291; *Squires v. Riggs*, 2 Hayw. 150; *Godfrey v. Cartwright*, 4 Dev. L. 487; *Thomas v. Orrell*, 5 Ired. L. 569; *Holdfast v. Shepard*, 6 Id. 361; *Lenoir v. South*, 10 Id. 237; *Brown v. Combs*, 29 N. J. L. 36; *McFadden v. Haley*, 2 Bay, 457; *Perry v. Walker*, Id. 461; *Perry v. Middleton*, Id. 462; *Middleton v. Perry*, Id. 539; *Watson v. Hill*, 1 McCord, 161; *Patton v. Cooper*, Cooke, 133; *Evarts v. Dunton*, Brayt. 67; *Chapin v. Scott*, 1 D. Chip. 41; see *Mahoney v. Middleton*, 41 Cal. 54; *Freeman on Cot. & Part.*, secs. 294, 343; *Cole on Ejectment*, 286. In *Winkworth v. Man*, Yelv. 114, it is said *obiter* that a verdict in ejectment for a moiety of the whole acre claimed would be ill, “for it is uncertain in which part the plaintiff shall have his *habere facias possessionem*.” Whatever effect this *dictum* might otherwise have is overcome by the English authorities cited above. A very early case in North Carolina, *Young v. Drew*, 1 Tayl. 119, held that an undivided interest is not recoverable under a claim for the whole; but this is effectually overruled by the cases in that state cited above. In Illinois, Maryland, Wisconsin, and at one time in New York, it is held, contrary to this manifest weight and majority of authority, that an undivided interest can not be recovered under a claim for the whole. But in each of these states except Maryland, this is based upon a construction of statutes in relation to ejectment prevailing therein.

In New York there has been some contrariety of decisions. It has always been held that one suing for the whole could recover a distinct part. This has been maintained throughout the cases which conflict on other points. It is first held in *Underwood v. Jackson*, 1 Wend. 95. In *Harrison v. Stevens*, 12 Wend. 170, and *Van Alstyne v. Spraker*, 13 Id. 578, Chief Justice Savage decided that the statute in respect to ejectment (2 R. S. 304, secs. 9, 10, 30) authorized the recovery of an undivided interest under a claim for the whole. Chief Justice Nelson in *Holmes v. Seely*, 17 Id. 75, 80, expressed doubt as to the correctness of the views entertained by Chief Justice Savage upon the construction of this statute, and declared that the plaintiff could not recover an undivided share under a claim for the whole, nor under a claim for an undivided share, a less undivided share. This *dictum* was followed in *Gillett v. Stanley*, 1 Hill (N. Y.), 129, and *Cole v. Irvine*, 6 Id. 639. *Holmes v. Seely* was doubted in *Hinman v. Booth*, 21 Wend. 267; *Ryers v. Wheeler*, 22 Id. 148; and *Truax v. Thorn*, 2 Barb. 157, 158, and finally overruled in *Vrooman v. Ward*, 2 Barb. 330; *Van Rensselaer v. Jones*, Id. 643; and *Neilson v. Neilson*, 5 Id. 573. These latter cases revive the construction of the statute maintained by Chief Justice Savage, and establish the law in this state, that under a claim for the whole

the plaintiff in ejectment may recover any part to which he proves title, whether it be separable and distinct or undivided; and under a claim for an undivided part he may recover any less undivided part: See Freeman on Cot. & Part., sec. 294, note.

In Wisconsin the plaintiff in ejectment can recover only that part of the property which he claims, and nothing more nor less, and he must state in his declaration the nature and extent of the estate claimed: *Allie v. Schmitz*, 17 Wis. 169. This is a decision under a statute similar to the New York statute, and the court follows the construction of this statute laid down in *Holmes v. Seely*, 17 Wend. 75; which latter case, as we have seen, has been overruled as far as it attempted to construe the statute in question. *Allie v. Schmitz* is cited and followed in *Bresee v. Stiles*, 22 Wis. 120.

In Illinois the law is as laid down in the principal case, and is based upon an independent construction of a statute similar to that of New York. The rule of the principal case, that under a claim for the whole of the property an undivided interest can not be recovered, is sustained in *Rawlings v. Bailey*, 15 Ill. 178; *Rupert v. Mark*, Id. 540; *Murphy v. Orr*, 32 Id. 489; *Winstanley v. Meacham*, 58 Id. 97.

In Maryland the deviation from the weight and majority of authority has not the excuse of a statute. In *Carroll v. Norwood*, 5 Har. & J. 155, 174, the law is stated to be, that although the plaintiff in ejectment may recover less than his claim, it must be of the same nature; thus, if he claim the whole, any distinct part less than the whole may be recovered; if he claim an undivided part, any less undivided part may be recovered; "but he can not recover an undivided part when he claims an entirety, nor an entirety when he demands an undivided portion." This seems to be based rather upon a shallow, verbal classification, than upon the practical requirements of this remedy, or upon the law. *Carroll v. Norwood* is cited and followed in *Benson v. Musseter*, 7 Har. & J. 212; *Magruder v. Peter*, 4 Gill & J. 331.

Under the Tennessee statute requiring the plaintiff to state the extent of his interest in his declaration, the omission to do so is not fatal on demurrer; for after verdict defining the plaintiff's interest in pursuance of the same statute, any imperfections in matters of form may be amended if the amendment be in furtherance of justice: *Royston v. Wear*, 3 Head, 9.

UNDER CLAIM FOR UNDIVIDED INTEREST, LESS UNDIVIDED INTEREST MAY BE RECOVERED.—When an undivided interest is demanded, any less undivided interest to which title is shown may be recovered. In *Ablett d. Glenham v. Skinner*, 1 Sid. 229, the lessor of the plaintiff was alleged to be entitled to a fourth part of a fifth part, and a third part of a fourth part of a fifth part was recovered: See *Goodwin v. Blackman*, 3 Lev. 334. Under claim of a moiety, a third part was recovered in *Den d. Burges v. Purvis*, 1 Burr. 326. The same principle is held in *Halsey v. Martin*, 22 Cal. 645. The cases cited in the preceding subdivision generally maintain the same proposition, which is in fact a corollary of the theorem that under a claim for the whole an undivided interest may be recovered.

VERDICT AND JUDGMENT FOR PART OF PROPERTY CLAIMED, REQUISITE CERTAINTY IN.—When a verdict for a distinct part of the property claimed is rendered, it must distinguish that part by metes and bounds, or otherwise with sufficient certainty to enable the sheriff to deliver possession to that part, and no other: *McArthur v. Porter*, 6 Pet. 205; *Chapman v. Holding*, 60 Ala. 522; *Munger v. Grinnell*, 9 Mich. 544; *Harrisburg v. Crangle*, 3 Watts & S. 460; *O'Keson v. Silverthorn*, 7 Id. 246; *Tryon v. Carlin*, 5 Watts, 371; *Ross v. Barker*, Id. 391; *Stewart v. Speer*, Id. 79; *Nolan v. Sweeny*, 80 Pa.

St. 77; *Van Nossen v. Pearson*, 4 Sneed, 362; *Loard v. Phillips*, Id. 566; *Brogan v. Savage*, 5 Id. 689; *Rivier v. Pugh*, 7 Heisk. 715; *Singleton v. Abe*, 3 Humph. 626; *Clay v. White*, 1 Munt. 192; *Gregory v. Jackson*, 6 Id. 25. The question of boundary is always a question of fact for the jury: *Barclay v. Howell's Lessee*, 6 Pet. 498.

The verdict must designate the extent of the undivided interest recovered: *Craig v. Taylor*, 6 B. Mon. 457; *Johnson v. Norton*, 3 Id. 429. And a judgment for the whole when title has been shown to a part interest only is erroneous, and will be reversed: *East St. Louis v. Hackett*, 85 Ill. 382; *Meraman's Heirs v. Caldwell's Heirs*, 46 Am. Dec. 537; *Hughes v. Holliday*, 3 G. Greene, 30. When several tenants in common bring ejectment, each can recover only his respective share: *Wilson v. Chandler*, 60 Ga. 129. So where title has been shown to a distinct part of the premises only, a verdict and judgment for the entire tract is erroneous: *Alcock v. Wilshaw*, 2 El. & El. 633; *Petty v. Malier*, 14 B. Mon. 246; *Gray v. Givens*, 26 Mo. 291; *Fenwick v. Gill*, 34 Id. 194; *White v. St. Guirons*, Minor, 331; *Thomas v. Orrell*, 5 Ired. L. 569; *Kelly v. Hare*, 1 Humph. 163. And the judgment must correspond with the verdict, though the verdict be rendered erroneously for the whole: *Clark v. Huber*, 20 Cal. 196; *Obert v. Hammel*, 18 N. J. L. 73; and see *Meraman's Heirs v. Caldwell's Heirs*, 46 Am. Dec. 537. Therefore, where, in an action of ejectment by co-tenants, there appeared to be other co-tenants, but their number was not shown, as it was impossible to ascertain to what portion of the property each co-tenant was entitled, plaintiffs could not recover, and if a verdict for the whole should be awarded under such circumstances, a new trial would be granted: *Doe & Hellyer v. King*, 6 Exch. 701; see also *Roe d. Saul v. Dawson*, 3 Wils. 49. But when a verdict has been rendered erroneously for the whole, the parties may by stipulation agree to take certain defined portions, and judgment may be entered accordingly: *Obert v. Hammel*, 18 N. J. L. 73; *Burdick v. Norris*, 2 Watts, 28. And if there be a verdict of guilty on several demises of separate tracts of land laid in different counts, judgment may be taken on the count proved and *nol. pros.* entered as to the others: *Fite v. Doe*, 1 Blackf. 127. There are cases which hold that where title is proved for a part only, judgment may be rendered for the whole, and the plaintiff takes possession at his peril and subject to restitution if he takes more than he has proved title to: *Holdfast v. Shepard*, 6 Ired. L. 361; *Pierce v. Wannett*, 10 Id. 446; *Godfrey v. Cartwright*, 4 Dev. 487; *Johnson v. Nevill*, 65 N. C. 677; *Paine v. York*, 10 Humph. 340; *Camden v. Haskill*, 3 Rand. 462, 465. In *Bledsoe v. Doe*, 5 Miss. 13, it is held that on a general verdict for the whole the plaintiff is entitled to a writ of possession only for the part proved. Plaintiff is entitled to a verdict if he can show a wrongful possession by the defendant of any part, no matter how small, of what he claims in his declaration: *Gilliam v. Bird*, 49 Am. Dec. 379.

AVERMENT OF ESTATE CLAIMED IN DECLARATION IN EJECTMENT.—The principal case is cited to the point that under a claim for a fee a less estate can not be recovered, in *Almond v. Bonnell*, 76 Ill. 539; to the point that the judgment must follow the declaration as to the nature of the estate claimed, and under a claim for a fee judgment can be rendered only for a fee, in *Christy v. Pulliam*, 17 Id. 63; *Minkhart v. Hankler*, 19 Id. 48; *Clark v. Thompson*, 47 Id. 29; to the point that the declaration must aver the nature of the estate claimed, as that it is a fee or for life or years, and the like, in *Rawlings v. Bailey*, 15 Id. 179; to the point that an undivided interest is not recoverable under claim for the whole, in *Rupert v. Mark*, Id. 541; *Dawley v. Van Court*, 21 Id. 464; *Murphy v. Orr*, 32 Id. 492; *Clark v. Thompson*, 47 Id.

29; *Winstanley v. Meacham*, 58 Id. 99; to the point that plaintiff can not recover a different estate from the one claimed, and therefore that he must recover the same undivided interest as that claimed, no more, no less, in *Lyon v. Kain*, 36 Id. 373.

STATUTE SHOULD RECEIVE CONSTRUCTION GIVEN TO IT BY COURTS OF STATE from which it has been re-enacted: *Myrick v. Hasey*, 46 Am. Dec. 553, *Rigg v. Wilton*, *infra*.

RIGG v. WILTON.

[13 ILLINOIS, 15.]

CONSTRUCTION GIVEN BY COURTS OF SISTER STATE TO STATUTE adopted from that state, if it be consistent with the spirit and policy of the laws of the adopting state, should be accepted by the latter.

BURDEN OF PROOF IS ON PARTY AFFIRMING EXECUTION AND VALIDITY of will, and he is entitled to open and conclude the case in the trial of an issue out of chancery, under revised statutes, chapter 109, section 6.

CERTIFICATE OF OATHS OF WITNESSES AT PROBATE OF WILL may be offered in evidence by either party in the trial of issue out of chancery to determine the validity and execution of a will, under revised statutes, chapter 109, section 6; but it is to receive such weight only as the jury may think it deserves, in connection with the other proof in the case, for such trial is *de novo* without regard to the fact of previous probate.

SIGNATURE BY TESTATOR OR BY SOME ONE IN HIS PRESENCE, and by his direction and attestation in his presence by two or more witnesses, are indispensably requisite to the due execution of a will under the statute.

AS TO SANITY OR CAPACITY OF TESTATOR, NO PARTICULAR QUANTUM OF EVIDENCE is necessary on the trial of an issue out of chancery, but the jury hear the proofs of the parties, and decide the issue like any other question of fact according to the weight of the evidence.

SUBSCRIBING WITNESSES NEED NOT CONCUR IN TESTIFYING TO CAPACITY OF TESTATOR on the trial of an issue out of chancery, and the will may be established even against their testimony, and the party sustaining the will is not bound to call them, although a failure to do so, unexplained, might be regarded as a suspicious circumstance.

ERROR to the St. Clair circuit court. The facts are stated in the opinion of the court.

W. H. Underwood, for the plaintiffs in error.

G. Koerner, for the defendants in error.

By Court, TREAT, C. J. This was a feigned issue out of chancery to determine the question whether a certain paper was the last will and testament of Clement Rigg. The plaintiffs alleged that it was not his last will and testament; the defendants affirmed that it was. On the trial, the defendants were allowed to open and conclude the case; and both of the sub-

scribing witnesses to the will were introduced, and testimony was offered tending to show that Rigg was of unsound mind and memory at the time of the execution thereof. The plaintiffs asked the court to instruct the jury: 1. "That proof by one subscribing witness, that the testator executed said will, and that said witness believes the testator to be of sound mind and memory at the time, is not sufficient to establish said will." 2. "That the sanity of the testator at the time of the execution of said paper writing is an affirmative fact, to be established by those affirming the validity of said will, and who hold the opening and conclusion of the case before the jury." 3. "That unless the jury are satisfied from the evidence that the sound mind and memory of the said Clement Rigg, at the time of the execution of the said paper writing, have been established, either by the concurring testimony of the two subscribing witnesses to their belief of his sound mind and memory at the time, or by other circumstances satisfying them of his sound mind and memory at that time, they are bound to find said paper writing not to be the will of said Rigg." The instructions were refused, and the plaintiffs excepted. The jury found the issue in favor of the defendants, and they had judgment.

This proceeding was had under the sixth section of the one hundred and ninth chapter of the revised statutes, which is in these words: "That if any person interested shall, within five years after the probate of any such will, testament, or codicil, in the court of probate, as aforesaid, appear, and by his or her bill in chancery contest the validity of the same, an issue at law shall be made up, whether the writing produced be the will of the testator or testatrix, or not; which shall be tried by a jury in the circuit court of the county wherein such will, testament, or codicil shall have been proved and recorded, as aforesaid, according to the practice in courts of chancery in similar cases; but if no such person shall appear within the time aforesaid, the probate, as aforesaid, shall be forever binding and conclusive on all the parties concerned, saving to infants, *femes covert*, persons absent from the state, or *non compos mentis*, the like period after the removal of their respective disabilities. And in all such trials by jury, as aforesaid, the certificate of the oaths of the witnesses at the time of the first probate shall be admitted as evidence, and to have such weight as the jury shall think it may deserve."

This provision is in substance a transcript of the eleventh and fifteenth sections of a statute of Kentucky, passed on the twenty-

fourth of February, 1797, except that the latter statute expressly authorizes the court to grant new trials as in other cases, and a party may appear and contest a will within seven years after it is admitted to probate. But these differences are unimportant as respects this case. It may, therefore, be proper to ascertain what interpretation has been given to the Kentucky statute by the courts of that state. And if it has there received a definite construction, and one that is consistent with the spirit and policy of our laws, it may with propriety be applied to the statute under consideration. It was decided in *Haydon v. Haydon*, 6 J. J. Marsh. 48, and *Rogers v. Thomas*, 1 B. Mon. 390, that on the trial of an issue under the statute, the burden of proof is on the party affirming the execution and validity of the will, and consequently that he has the right to open and conclude the case. In the latter case the court held that such party is bound to prove affirmatively that the contested paper is the last will and testament of the testator. The issue is to be submitted to the jury as a new and original question, and determined exclusively upon the evidence introduced before them. The trial is *de novo*, and without regard to the fact that the instrument has been admitted to probate. The certificate of the oaths of the witnesses at the time of the probate may be offered in evidence by either party; but it is to receive such weight only as the jury may think it deserves, in connection with the other proof in the case.

We are satisfied that this rule of construction is sound and reasonable, and well calculated to carry out the real intentions of the legislature. In practice it will best promote the ends of justice, and protect the right of parties. Wills are generally admitted to probate upon the *ex parte* statements of the attesting witnesses, when no opportunity is afforded the parties interested to appear and insist on their rights. The object of the statute in question is to give them the benefit of a full and thorough investigation of all the circumstances attending the execution of the will. And they are not to be embarrassed or prejudiced by the previous proceedings before the probate court. The party who relies on the will is called upon to prove anew its execution and validity. And what he is required to prove to sustain the instrument, the other party is permitted to disprove in order to defeat it. There are some indispensable requisites to the due execution of a will. It must be signed by the testator, or by some one in his presence and by his direction; and attested in his presence by two or more witnesses.

A paper that has not thus been subscribed and witnessed has no force or effect as a will under our statute. But as to all other questions affecting its validity, such, for example, as the sanity or capacity of the testator, no particular *quantum* of evidence is necessary on the trial of an issue under the statute. The jury are to hear the proofs submitted by the parties, and decide the issue as they would any other question of fact, according to the weight of the evidence. Nor is it essential that the proof should be made by particular witnesses. The subscribing witnesses need not concur in testifying to the sound mind and memory of the testator; and the will may be even established against their testimony. The party sustaining the will is not bound to call them, although a failure to do so, unexplained, might be regarded as a suspicious circumstance.

It is enough that the jury are convinced, from any legitimate testimony, of the sanity and capacity of the testator. It would, indeed, be a harsh rule to hold, that after a lapse of many years, a will could only be established by the concurring testimony of two of the subscribing witnesses. They may be in the interest of the assailants of the will, or beyond the reach of those seeking to sustain it. It may be true, that in the admission of a will to probate in the first instance, two of the attesting witnesses must declare the circumstances under which it was executed, and their belief that the testator was of sound mind and memory. But the reasons for such a requisition are to be found in the fact that the will may be presented by the executor and admitted to record, upon the *ex parte* testimony of the witnesses, without notice to the parties interested, and without an opportunity on their part to appear and resist the application. But these reasons do not exist in the case of the trial of an issue out of chancery. In such case the parties are brought before the court for the express purpose of having all questions respecting the validity of the will forever put at rest. It was clearly the design of the legislature that an issue under the statute should be determined like every other issue out of chancery, upon the weight and preponderance of the testimony adduced by the parties. This may be gathered from the expression in the statute, that the issue shall be tried by a jury, "according to the practice of courts of chancery in similar cases." And it is further evidenced by the provisions of an act of the twenty-fifth of February, 1845, which declares, that when probate of a will shall be refused, and an appeal shall be prosecuted, the party seeking probate may support the will by any evidence that

would be competent on the trial of an issue out of chancery, for the purpose of contesting the validity thereof.

In our view of this case, the second instruction was correct, and the court erred in refusing it. The judgment must, therefore, be reversed, and the cause remanded for another trial of the issue.

Judgment reversed.

EXECUTION AND ATTESTATION OF WILL, REQUISITES OF: See *Rosser v. Franklin*, 52 Am. Dec. 97, and cases cited in the note.

ON APPEAL FROM PROBATE OF WILL, BURDEN OF PROOF and the privilege of opening and concluding the case is with the party affirming the validity of the will: See *Potts v. House*, 50 Am. Dec. 329, holding that it is with the executor. The principal case is cited to this point in *Potter v. Potter*, 41 Ill. 84.

CONSTRUCTION OF STATUTE ADOPTED FROM SISTER STATE should be that which is given it by the courts of that state: *Myrick v. Hasey*, 46 Am. Dec. 583; *Ballance v. Rankin*, ante, 412. The principal case is cited to this effect in *Grattan v. Grattan*, 18 Ill. 170; *Streeter v. People*, 69 Id. 598; *Gage v. Smith*, 79 Id. 224. And in *Case of Sewing Machine Companies*, 18 Wall. 584, it is cited in support of the proposition that words and phrases, the meaning of which in a statute has been ascertained by judicial interpretation, are, when used in a subsequent statute, to be understood in the same sense.

SUBSCRIBING WITNESSES SHOULD BE CALLED IN ISSUE OF *devisavit vel non* out of chancery: *Jauncey v. Thorne*, 45 Am. Dec. 424.

MENTAL INCAPACITY DEFINED: See *Foster v. Means*, 42 Am. Dec. 332, and cases cited in the note. Evidence necessary to establish testamentary capacity: See *Trumbull v. Gibbons*, 51 Id. 253; *Woodward v. James*, Id. 642.

NO APPEAL LIES FROM JUDGMENT ON FEIGNED ISSUE OUT OF CHANCERY, as such judgment is interlocutory. In deciding this, the court, in *Woodside v. Woodside*, 21 Ill. 208, referring to the principal case, upon which counsel for the plaintiff in error relied, said that if an objection had been made in the principal case at any stage of the proceedings it would have been sustained, and the case dismissed on the ground of its being an appeal from an interlocutory judgment.

MCDONALD v. WILKIE ET AL.

[13 ILLINOIS, 22.]

DEMURREE OPENS WHOLE RECORD, AND WILL BE CARRIED BACK and sustained to the first substantial defect in the pleadings.

PLEA DEFENDING ALLEGED TRESPASS ON GROUND OF APPLICATION FOR ISSUANCE OF CA. SA. is bad, when it omits to allege the due issuance of the ca. sa., and the arrest and imprisonment of plaintiff by virtue thereof.

CONSTABLE IS PROTECTED IN EXECUTION OF PROCESS OF JUSTICE OF PEACE which shows upon its face that the justice had jurisdiction of the subject-matter, when nothing appears to apprise him that he had not jurisdiction also of the person.

JOINT JUDGMENT IN FAVOR OF SEVERAL DEFENDANTS, if erroneous as to one, will be reversed as to all.

JUSTICE OF PEACE CAN NOT ISSUE EXECUTION AGAINST BODY OF DEFENDANT, under the Illinois statute, upon a judgment founded upon contract before an execution has been returned unsatisfied against his property.

THIS was an action of trespass for an assault and battery and false imprisonment, by McDonald against Wilkie, Lyonberger, a justice of the peace, and Lowry, a constable. The defendants pleaded the general issue, and also specially. The defendants' special pleas are sufficiently described in the opinion. Plaintiff demurred separately to these special pleas, and his demurrers were overruled. Plaintiff then replied specially, that before the rendition of said judgment, Wilkie had caused an attachment to be issued in the said suit by said Lyonberger against plaintiff's personal property; and that by virtue of this attachment Lowry had taken into his possession personal property of the plaintiff of sufficient value to satisfy said judgment; and that this property was still in the hand of Lowry when the *capias ad satisfaciendum* was issued and plaintiff was taken into custody by Lowry; and that at and before these times execution never issued against plaintiff's goods, nor was any order of sale made of the property held under attachment. Defendants severally rejoined, denying that Lowry had taken under the attachment and had in his possession goods of plaintiff sufficient to pay the debt at the time of the alleged cause of action. Plaintiff's demurrers to the rejoinders were overruled, and judgment rendered thereon against the plaintiff for costs.

W. B. Scates, for the plaintiff in error.

D. Baugh, for the defendants in error.

By Court, TRUMBULL, J. McDonald sued Wilkie, Lyonberger, and Lowry in an action of trespass *vi et armis*. The defendants pleaded separately, and the case was decided on a demurrer to rejoinders, which the court overruled and gave judgment against the plaintiff for costs.

Since the judgment in the circuit court, Lyonberger has deceased, whereby the suit as to him has abated, and it will be unnecessary to notice the pleas which he filed.

The demurrer to the rejoinders opens the whole record, and will be carried back to the first substantial defect in the pleadings.

The special plea filed by Wilkie states, in substance, that before the assaulting, imprisoning, etc., of the plaintiff, as alleged in his declaration, he had obtained a judgment against him for ninety-nine dollars and ninety-nine cents, before Lyonberger, a

duly qualified justice of the peace having jurisdiction to enter such judgment; that he made oath before said justice that he verily believed McDonald to be able to pay the judgment, but that he withheld his money and secreted his property from the officer, so that the debt could not be levied; and thereupon he demanded an execution against the body of McDonald, as he lawfully might for the causes aforesaid, which was the supposed trespass complained of. This plea is clearly bad. It does not even allege that a *ca. sa.* ever issued; and if it did, there is no averment that McDonald was arrested and imprisoned under it. The fact that Wilkie made oath before a justice of the peace and demanded an execution against the body of McDonald, was surely no justification for his assaulting him. To have made the plea good, it should have gone on to allege that the justice issued the *capias ad satisfaciendum*, that the writ was subsequently placed in the hands of an officer to execute, and that under and by virtue of it McDonald was arrested and imprisoned. The plea was no answer to the replication, and the demurrer to the rejoinder to replication should have been carried back and sustained to this plea.

The plea of Lowry justified the trespasses complained of under a writ of *ca. sa.* placed in his hands, as constable, to be executed, and we think presented, *prima facie*, a good defense to the action, so far as he was concerned. A constable is protected in the execution of process issued by a justice of the peace, which shows upon its face that the justice had jurisdiction of the subject-matter, and nothing appears to apprise him that he had not jurisdiction also of the person. If the officer have notice of an excess or want of jurisdiction in the justice to issue the process, he would doubtless render himself liable by acting under it: *Barnes v. Barber*, 1 Gilm. 401.

If it were admitted that the *ca. sa.* was issued without authority, there is nothing in the pleadings to show that Lowry had knowledge of that fact. The replication to his plea was wholly defective. It failed to show that the pleadings in the case of the attachment had any connection with the judgment upon which the *ca. sa.* issued. For aught that appears, there may have been two actions against the plaintiff for different demands, one by attachment, and the other in the ordinary mode. It is wholly immaterial whether Lowry's rejoinder to this replication was good or not. It was certainly good enough for a bad replication, and had a separate judgment been entered in his favor for costs, this court would have been compelled, as to him,

to affirm the judgment. The judgment, however, being joint in favor of all the defendants, and erroneous as to one, will have to be reversed as to all. A judgment jointly entered in favor of several defendants, whether in an action upon contract or for tort, can not be affirmed as to one and reversed as to another. Such a judgment is an entirety, and must stand or fall together: *Harman v. Brotherson*, 1 Denio, 537; *Cruikshank v. Gardner*, 2 Hill (N. Y.), 333; *Sheldon v. Quinlen*, 5 Id. 441; *Gaylord v. Payne*, 4 Conn. 190; Bac. Abr., tit. Error, M.

As the case has to be remanded, it will be proper to express an opinion upon the right of the justice of the peace to issue an execution against the body, upon the state of facts set forth in the plea of Wilkie; which was the main point argued by counsel, and which will doubtless arise again upon an amendment of the pleadings in the court below.

The decision of this question involves a construction of the ninety-first section of the act concerning justices of the peace and constables, which is as follows: "In cases of judgment for debt, whenever the plaintiff, or his authorized agent, shall make oath, before the justice in whose office such judgment may be, that he or she verily believes the defendant or defendants to be able to pay such judgment, and withholds the money, or secretes his, her, or their property from the officer, so that the debt can not be levied, it shall be lawful for the plaintiff to demand, and for the justice to issue, execution against the body of such defendant or defendants."

Under this provision of the statute, it is insisted, by the defendants' counsel, that a plaintiff, upon obtaining judgment before a justice of the peace, has the right, immediately upon making the requisite affidavit, to sue out execution against the body of the defendant, without having first had an execution issued against his goods and chattels, and returned unsatisfied. We do not so understand the law. The ninety-first section, above quoted, is but a reiteration of the first section of the act concerning insolvent debtors, R. S., c. 52, which authorizes a *ca. sa.* against the body of a defendant in execution in no case, except he shall refuse to surrender his estate, goods, or chattels, for the satisfaction of an execution which may have been issued against his property. These provisions of the statute, being in *pari materia*, are to be construed together, and, when considered in that connection, there can be no question, except in cases of judgments in actions of trespass or trover before justices of the peace, specially provided for by section 90, chapter 59, that an

execution must first issue against the property of the defendant, before one can lawfully issue against his body. How is it possible for a defendant to withhold or secrete his property from an officer, as specified in the ninety-first section, when there has been no officer clothed with authority to take or seize his property?

Taken by itself, a fair construction of this provision of the statute would not justify an execution against the body, in the first instance; but when considered in connection with the provisions of the insolvent debtor's act, it is clear that a justice of the peace transcends his authority who issues execution upon a judgment founded upon contract against the body of a defendant, before an execution has been issued and returned unsatisfied against his property.

The judgment of the circuit court will be reversed and the cause remanded, with directions to that court to enter a separate judgment for the defendant Lowry, on the demurrer of plaintiff to his rejoinder, and with leave to Wilkie to plead a *de novo*.

Judgment reversed.

GENERAL DEMURRER, EFFECT OF: See *Baughner v. Nelson*, 52 Am. Dec. 694, and cases cited in the note; *Union Bank v. Powell*, Id. 367, and note; *Coffin v. Knott*, Id. 537, and note. In *Peoria etc. R. Co. v. Neill*, 16 Ill. 271, the principal case is cited to the point that a general demurrer opens to the court the entire record, and will be sustained to the first defective pleading.

JUSTIFICATION OF OFFICERS UNDER THEIR PROCESS, and their liability for abuse thereof: See *Breck v. Blanchard*, 51 Am. Dec. 222, citing prior cases in the note. In *Gorton v. Frizzle*, 20 Ill. 296, the principal case is cited to the point that an officer can not justify under a void writ; and in *Leachman v. Dougherty*, 81 Id. 328, to the point that a ministerial officer is not protected in the execution of process regular upon its face, if he have knowledge of facts rendering it void.

JUDGMENT ERRONEOUS AS TO ONE OF SEVERAL DEFENDANTS must be reversed as to all: See *St. John v. Holmes*, 32 Am. Dec. 603, and note 605. To this point the principal case is cited in *Brockman v. McDonald*, 16 Ill. 113.

HOWEY v. GOINGS.

[13 ILLINOIS, 95.]

JURISDICTION OF EQUITY IN PARTITION IS UNDOUBTED, and in many cases is indispensable.

BILL IN CHANCERY LIES FOR PARTITION, NOTWITHSTANDING ADVERSE POSSESSION, unless it has been continued sufficiently long to bar a recovery under the statute of limitations.

EQUITY WILL AT ONCE DECREE PARTITION BETWEEN PARTIES WHEN TITLE IS CLEAR, though when the title is doubtful, it sometimes requires complainant to establish his right at law before proceeding in the partition suit.

HUSBAND CAN CONVEY NO GREATER INTEREST IN REAL ESTATE OF WIFE than he himself possesses.

HUSBAND'S INTEREST IN WIFE'S ESTATE IS TERMINATED BY DIVORCE A VINCULO.

OMISSION TO DISPOSE OF CROSS-BILL CLAIMING COMPENSATION FOR IMPROVEMENTS, at the same time the decree for partition is made, is not error.

IN PARTITION, CO-TENANTS HAVING MADE IMPROVEMENTS are entitled to have the portions of the premises including the improvements set off to them if practicable, and if the premises must be sold, are entitled to the actual increase of price received at the sale in consequence of the improvements.

THIS was a bill for partition of certain real estate by Temperance Goings against James M. Howey, Hezekiah Applegate, John P. Stark, and Jonas Goings. The property had been originally owned in fee simple by one William Howey, a brother of complainant Goings, and defendant James Howey. William Howey died intestate, leaving them sole heirs. Complainant Goings prays partition as owner in fee simple of an undivided half of the property. Complainant married Jonas Goings, who is a defendant in this action, and against whom the bill was taken as confessed upon his default. Complainant obtained a divorce, on the ground of adultery, from Jonas Goings in June, 1849. Defendants answered that prior to the divorce Jonas Goings and defendant Howey had made a partition of the lands in question, and in 1845 executed to each other deeds in fee simple of parts thereof assigned to each respectively. In 1847, defendant Howey conveyed to Applegate, the co-defendant in this suit, his portion of the premises acquired under the partition with Jonas Goings. Jonas Goings, in July, 1849, conveyed in fee simple a portion of the premises acquired by him under the partition to Stark, the other co-defendant in this suit. Applegate and Stark entered into and continued in possession of the property so conveyed to them. Jonas Goings at the same time conveyed in fee simple a further portion of the property to defendant Howey, who had since held possession thereof. Replication to the answers was filed. A cross-bill setting forth improvements and claiming their value in the event of partition was filed by defendants Howey, Applegate, and Stark. Complainant answered the cross-bill, denying the right of defendants to compensation. A report of a master in chancery was

made, a reference of the cause having been made to him, as to the improvements and their value and the amount of rents and waste. At the March term of 1851 the cause was heard upon the pleadings and exhibits, the proof being of the facts as stated, and a decree of partition was rendered in favor of the complainant. Stark and Howey appealed.

R. S. Blackwell, and M. Hay, for the appellants.

J. Grimshaw, for the appellee.

By Court, TRUMBULL, J. This was a proceeding in chancery, for a partition of certain real estate, of which the complainant claimed an undivided half. The record clearly shows that she was entitled to the interest claimed; but her claim for partition is resisted, upon the ground that the lands sought to be divided were at the time of filing the bill, and for some time previous had been, in the adverse possession of the defendants.

They also filed a cross-bill, claiming the right, in case of a division, to reserve certain improvements put upon portions of the lands, or pay for the same in case of a sale.

The circuit court decreed that complainant have partition of the lands mentioned in her bill, and that one half of the same be set off to her, and appointed commissioners to make the division.

The defendants object to this decree, upon the ground that the complainant was disseised of the premises at the time of filing her bill, and for the further reason that the matters alleged in the cross-bill are not disposed of by decree.

The case has been argued as if it were a proceeding under the statute upon the common-law side of the court, when, in fact, it is strictly a chancery proceeding in all its features. The jurisdiction of courts of equity, in matters of partition, is undoubted. Indeed, in a great variety of cases, especially where the property is of a complicated nature, as to rights, easements, modes of enjoyment, and interfering claims, the interposition of a court of equity seems indispensable for the purposes of justice. The remedy in equity is often more complete than at law; as where one tenant in common has been in the exclusive reception of the rents and profits, on a bill for partition and account, the latter also will be decreed. "So when one tenant in common, supposing himself to be legally entitled to the whole premises, has erected valuable buildings thereon, he will be entitled to an equitable partition of the premises, so as to give him the benefit of his improvements; or, if that can not be

done, he will be entitled to a compensation for the improvements:" 1 Story's Eq. Jur., secs. 655, 656.

It was said, in the case of *Parker v. Gerard*, Amb. 236, "that such a bill is matter of right, and there is no instance of not succeeding in it, but where there is not proof of title in plaintiff." See also Cooper Eq. Pl. 135; 2 Daniell's Ch. Pr. 770; 1 Story's Eq. Jur., secs. 646-658.

It is unnecessary, in our view of the case, to inquire whether the possession of the defendants was adverse or not; or, if adverse, whether a petition for partition under the statute would lie. The common-law mode of proceeding for partition has been greatly extended by our statute, which is more comprehensive than that of any other state to which reference has been made, and it may well be questioned, whether adverse possession, without regard to length of time, would bar a proceeding under it. There can be no doubt, however, that a bill in chancery lies for partition, notwithstanding an adverse possession, unless it has been continued sufficiently long to bar a recovery under the statute of limitations, which is not pretended in this case: *Overton v. Woolfolk*, 6 Dana, 374.

Where the title is denied, and is of a doubtful character, courts of equity have sometimes required the party seeking a partition to establish his right at law, before proceeding with the partition suit; but when, as in this case, the title is clear, equity will at once decree a partition between the parties: *Cartwright v. Pultney*, 2 Atk. 380; *Agar v. Fairfax*, 17 Ves. 543; *Allen v. Barkley*, 1 Spears Eq. 264; *Oldhams v. Jones*, 5 B. Mon. 458.

The husband of the complainant could convey no greater interest in the real estate of his wife than he himself had. His right in the land of his wife, being an estate during coverture, is terminated by a divorce *a vinculo matrimonii*, granted for his misconduct: R. S., c. 34, sec. 12; *Clarke v. Lott*, 11 Ill. 105; *Starr v. Pease*, 8 Conn. 541.

We perceive no error in the omission to dispose of the cross-bill at the same time the decree for partition was made. We will not now undertake to determine whether the defendants are entitled to pay for improvements or not. The circuit court might with propriety, if warranted by the facts before it, have directed, at the time of the appointment of commissioners, that in making partition, they should, if practicable, set off to defendants those portions of the premises, including their improvements; but it was not absolutely necessary that such an

order should have been made at that time. It may be that the premises will have to be sold, in consequence of not being susceptible of division; and in that event, it may be that the defendants should be allowed the actual increase of the price received at the sale, in consequence of the improvements by them made: *Louvalle v. Menard*, 1 Gilm. 45 [41 Am. Dec. 161].

These questions can, however, all be disposed of in the future proceedings to take place in the case; and it will be time enough for this court to act upon them after the circuit court shall first have done so.

That the complainant is entitled to partition of the premises, there is no doubt.

The decree of the circuit court is affirmed, at the costs of the appellants, and the cause remanded for further proceedings.

Decree affirmed.

PARTITION, RIGHT OF EQUITY TO RETAIN BILL FOR, WHERE THERE IS ADVERSE POSSESSION OF PROPERTY.—Partition is not the proper action to try title to land: *Manners v. Manners*, 35 Am. Dec. 512. Evidence of adverse possessory title to part of the premises sought to be partitioned is admissible to defeat the partition: *Harman v. Kelley*, 45 Id. 552, and cases cited in the note. In *Hoffman v. Beard*, 22 Mich. 66, 73, it is held that a bill for partition can not be maintained where there is an adverse possession of the premises, and the court, *per* Christiancy, J., says that in the principal case there was no serious dispute as to title, and declares that “the *dictum*” allowing a bill to be maintained in such a case is not sustained by *Overton v. Woodfolk*, 6 Dana, 374, there cited in its favor. In *Cuyler v. Ferrill*, 1 Abb. 182, Erskine, J., questions the authorities which hold that adverse possession will prevent a suit for partition, and cites the principal case with approval.

COMPENSATION TO CO-TENANTS FOR IMPROVEMENT IN CASE OF PARTITION: See *Louvalle v. Menard*, 41 Am. Dec. 161, cited in the principal case, and the prior cases in this series cited in the note. In *Mahoney v. Mahoney*, 65 Ill. 408, and *Wilton v. Tazewell*, 86 Id. 31, the principal case is cited to this point. In *Hawkins v. Taber*, 47 Id. 461, the principal case is cited as authority to the point that equity has jurisdiction in cases of partition to enter a decree in the same suit in favor of a co-tenant for rent in arrear. It is cited in *Hassett v. Ridgley*, 49 Id. 202, to the point that a judgment in partition under the Illinois statute vests title in owners as it did at common law under the writ of partition.

HUSBAND'S INTEREST IN WIFE'S REALTY, TERMINATION OF.—Adultery of husband will not work a forfeiture of his curtesy, nor is it forfeited by a conveyance in fee of his interest in the estate: *Wells v. Thompson*, 48 Am. Dec. 76.

PEOPLE EX REL. MCCLINTOCK v. SKINNER.

[18 ILLINOIS, 287.]

JURISDICTION OF APPELLATE COURT ON APPEAL FROM JUSTICE'S COURT is no greater than that of the justice's court.

APPELLATE COURT MUST DISMISS SUIT APPEALED FROM JUSTICE'S COURT whenever it appears that the justice had no jurisdiction.

JUDGMENT FOR SUM WITHIN JURISDICTION OF JUSTICE OF PEACE shows *prima facie* his jurisdiction in that respect.

VERDICT FOR SUM BEYOND JURISDICTION OF JUSTICE OF PEACE, rendered on appeal from justice's court, shows *prima facie* that the case was not within the jurisdiction of the justice.

PLAINTIFF CAN NOT, BY REMITTING PORTION OF VERDICT RENDERED ON APPEAL from justice's court, confer jurisdiction thereupon.

APPELLATE JUDGE MAY DECLINE TO REGARD VERDICT IN EXCESS OF JURISDICTION of justice of peace, as a conclusive test of jurisdiction, and need not dismiss the case, but he has no authority to determine the amount of indebtedness, except on the question of jurisdiction.

VERDICT ON APPEAL FROM JUSTICE'S COURT BEING IN EXCESS OF JURISDICTION thereof, plaintiff should move for a new trial.

APPLICATION for a peremptory *mandamus*. The facts are stated in the opinion of the court.

Warren and Edwards, for the relator.

Browning and Bushnell, contra.

By Court, TREAT, C. J. McClintock sued Smith before a justice of the peace, and recovered a judgment for sixty-two dollars and fifty-two cents. On appeal, the jury returned a verdict in favor of McClintock for one hundred and thirty dollars and sixty-two cents. On the coming in of the verdict, he entered a *remittitur* for thirty dollars and sixty-two cents. Smith made a motion in arrest of judgment, which was overruled; and the court, on its own motion, set aside the verdict, and continued the case. McClintock then entered a motion for a judgment for one hundred dollars and costs, which was denied. He has sued out a *mandamus* from this court for the purpose of compelling the circuit judge to enter a judgment on the verdict for one hundred dollars; and on the foregoing state of facts, a peremptory *mandamus* must be awarded or refused.

The maximum of the justice's jurisdiction was one hundred dollars. The result of the first trial showed, *prima facie*, that he had jurisdiction of the case. The jurisdiction of the circuit court was no greater than that of the justice. It is the duty of a circuit court to dismiss a suit which is before it by appeal, whenever it appears that the justice had no jurisdiction of the

subject-matter: R. S., c. 59, sec. 67. The verdict on the second trial showed, *prima facie*, that the case was not within the jurisdiction of the justice. If more than one hundred dollars was really due on the claim in controversy, the justice was without jurisdiction, and the circuit court should have dismissed the case.

It is very clear that the plaintiff could not confer jurisdiction by remitting a portion of the verdict. The *remittitur* did not determine that but one hundred dollars were actually due. The circuit judge was probably satisfied, from the evidence, that not more than one hundred dollars was due to the plaintiff; and he therefore declined to regard the verdict as a conclusive test of jurisdiction, and dismiss the case. He had no authority to determine the amount of the indebtedness, except on the question of jurisdiction. For every other purpose the parties had a right to have that fact ascertained by a jury. We can not say that the circuit court has committed any error to the prejudice of the plaintiff. He was not entitled to judgment on the verdict; for, so long as it was permitted to stand, the jurisdiction of the court was, *prima facie*, avoided. Admit that the court possessed no authority to set aside the verdict on its mere motion, it does not help the plaintiff's case. If the verdict should be reinstated, the court could not be compelled to enter a judgment on it in his favor. This is all that need be decided on this application. We purposely leave open the questions whether the court should have sustained the motion in arrest of judgment, and whether it had any power to grant a new trial, except at the instance of a party to the case. It may be added that the plaintiff might have obviated all difficulty in the case by asking and obtaining a new trial.

The application for a peremptory *mandamus* is refused.

Application denied.

CONSENT OF PARTIES WILL NOT CONFER JURISDICTION ON JUSTICE OF PEACE: See *Spear v. Carter*, 48 Am. Dec. 688. Plaintiff can not give the defendant a credit without his consent, and thus bring the sum due within the jurisdiction of the inferior court: *Bent v. Graves*, 15 Id. 632; see *Grayson v. Williams*, 12 Id. 568.

JURISDICTION OF APPELLATE COURT ON APPEAL FROM JUSTICE'S COURT.—Where justice's court has no jurisdiction, the circuit court can not acquire any by appeal: *Levy v. Shurman*, 42 Am. Dec. 690.

JUSTICE OF PEACE SHOULD DISMISS ACTION WHERE AMOUNT IN CONTROVERSY, as appears from the declaration, exceeds his jurisdiction. Such dismissal should be made without imposition of costs on plaintiff: *Elderkin v. Spurbeck*, 52 Am. Dec. 148.

MERRY v. BOSTWICK.

[18 ILLINOIS, 208.]

CONVEYANCE TO DEFRAUD CREDITORS MADE TO CREDITOR OF VENDOR under suspicious circumstances is not relieved from the taint of fraud, by being made ostensibly in discharge of the debt.

PURCHASER AT EXECUTION SALE CAN NOT HAVE REDEMPTION OF PROPERTY SET ASIDE in equity on the ground of fraud while still retaining the redemption money.

CREDITOR HAVING TWO JUDGMENTS ACQUIRES NO INTEREST AGAINST CREDITOR who has redeemed the property from the sale under the senior judgment, by a purchase of the same property at a sale under the junior judgment, made before the time expires for redemption under the senior judgment by the judgment debtor. He does not thereby acquire the judgment debtor's equity.

JUDGMENT DEBTOR'S RIGHT TO REDEEM PROPERTY SOLD ON EXECUTION can not be sold under execution.

THIS was a bill in equity filed by Samuel Merry, complainant, against John Bostwick and George Seeber, defendants. Merry had recovered two judgments against Bostwick, one in January and one in February, 1838. Under the January judgment about six acres of land in Upper Alton was levied upon, sold, and purchased by Merry. Within the three months in which judgment creditors may redeem after the expiration of the twelve months allotted to the judgment debtor to redeem, Seeber, having become a judgment creditor of Bostwick, redeemed these six acres. Soon after the levy and sale under the January judgment, and in the same year, a levy and sale under the February judgment was made of the same six acres, besides a large amount of other real estate, as the property of Bostwick, and complainant Merry became the purchaser. All of this property had been previously conveyed to Seeber by Bostwick. Complainant in his bill claimed the property by virtue of the sale under the junior judgment, saying nothing as to the sale and redemption under the senior judgment. The bill alleged that the deed from Bostwick to Seeber was fraudulent, and prayed that defendants be required to deliver possession of the property, that deeds of the same be given the complainant, and that Seeber's deed be declared void. The court decreed, that as to all the land, except the six acres in Upper Alton, Seeber's deed was void and complainant entitled to it, but confirmed and established it as to the said six acres. The evidence as to the fraudulency of the deed and the other points relied upon are sufficiently stated in the opinion of the court.

William Martin and S. T. Logan, for the plaintiff in error.

Billings and Parsons, for the defendants in error.

By Court, TRUMBULL, J. By consent, both parties have assigned errors upon this record. The complainant objects to that part of the decree which allows Seeber any portion of the real estate in controversy, and Seeber complains because he can not have it all. That the deed from Bostwick to Seeber was fraudulent as to creditors we can not entertain a doubt. It bears date in October, 1836, and purports to have been executed in consideration of twelve thousand dollars paid by the latter to the former.

The evidence clearly shows that Bostwick resided in Louisiana in 1835, and was then insolvent; that he removed from thence to Illinois the same year; that soon after coming to this state he engaged largely in land speculations, and at the date of the deed to Seeber had contracted debts, on account of the purchase of real estate, to the amount of eighty thousand dollars; that Bostwick expended in improvements on the six acres in Upper Alton more than twenty thousand dollars, to say nothing of the other real estate embraced in the conveyance, and that ten thousand dollars of this amount was expended after the date of the deed; and although Bostwick, according to the speculative value put upon his real estate at that time, was not insolvent, yet it appears that while in such flourishing circumstances, and when property was rapidly appreciating in value, he conveyed to Seeber two hundred and seventy-three acres of land in Madison county, besides the six acres on which he had then expended from ten to fifteen thousand dollars in the erection of a splendid dwelling which he subsequently finished at a further expense of some ten thousand dollars, all, as Bostwick and Seeber insist, in consideration of the discharge of a debt due the latter of only twelve thousand dollars, and the use of the six acres and dwelling for five years, the parties themselves estimating the rent of eight hundred dollars per annum. These circumstances, in connection with the character of the improvements made by Bostwick; the fact that he remained in possession and made improvements as well after the sale as before, all the while acting as and being reputed to be the owner; the fact that Seeber was his son-in-law; that Bostwick left Louisiana largely in debt, and if not insolvent when the conveyance was made, became largely so shortly afterwards, leave but little doubt that the conveyance was intended to place the property in

a situation where it could not be reached by creditors, in case the speculations of Bostwick should turn out disastrously.

The year 1836 is distinguished as a period of reckless speculation and extravagance throughout the United States; and without commenting minutely on the mass of evidence in this record, all of which has been carefully examined, the whole case shows that the conveyance to Seeber was made, as well to place the property it embraced beyond the reach of creditors in case of a revulsion in the affairs of Bostwick, as to discharge a debt due to Seeber.

We think the evidence does show that Bostwick was indebted to Seeber in some amount; but this circumstance does not relieve the transaction from the taint of fraud in law. The statute makes void all conveyances made with the intent to delay, hinder, or defraud creditors of their just and lawful claims. The complainant has shown himself such a creditor at the time the deed to Seeber was executed, and as to him it must be set aside.

If this was the only branch of the case, there could be no doubt of the complainant's right to have satisfaction of his debt out of the property conveyed to Seeber. But there is another feature in the case which prevents his holding the six acres on which the dwelling-house is situated, either on the purchase heretofore made or subjecting it to an execution hereafter to be issued. The complainant obtained two different judgments against Bostwick, at different times, before different courts, and for different amounts. The elder of these judgments was rendered at the January term, 1838, of the municipal court for the city of Alton, and was for the sum of one thousand and six dollars and sixty-six cents. The six-acre tract was sold on an execution issued on this judgment and purchased in by the complainant, August 20, 1838, for five hundred dollars, from which sale Seeber, as a judgment creditor, redeemed on the twenty-eighth of August, 1839, by virtue of a judgment in his favor against Bostwick, obtained in July, 1839, in the circuit court of Morgan county. The redemption money was paid to the sheriff, and by him to the complainant, who received the same without objection. None of these facts are noticed by the complainant in his original bill, but Seeber sets them up in his answer, alleging that he made the redemption, not because the deed from Bostwick was insufficient to convey him the title, but to avoid any litigation which might possibly grow out of it.

The complainant admits the judgment sale and redemption as

alleged by Seeber in his answer, and seeks to avoid their effect in his amended bill, by alleging that the judgment under which Seeber redeemed was founded on a warrant of attorney executed by Bostwick to Seeber, without any consideration, "to enable him to procure a judgment thereon which should be used by Seeber to defraud the complainant, and prevent him from enjoying the fruit of his purchase." It is difficult to conceive how the complainant was to be defrauded of the benefit of his purchase by the redemption. In the very act of redeeming, Seeber refunded to the complainant the whole amount he had given for the land, with ten per cent. interest. This money the complainant received without objection, and still retains, without even an offer to return it. Under such circumstances, it comes with an ill grace from him to allege that he has been prevented from enjoying the fruit of his purchase. The legal presumption is that he bid for the property what he considered it worth, and he knew at the time that the defendant in execution would have the right to redeem from his purchase at any time within twelve months, and if he failed to do so, that judgment creditors would have the same right for three months longer. If the redemption was invalid, as complainant in his amended bill alleges, even then he could not succeed in this suit, for the reason that he does not pretend to claim the property on the first purchase, but under a purchase which he subsequently made at a sheriff's sale on an execution issued upon a junior judgment.

The allegations and proofs must correspond, and the case made by the complainant, under his purchase on a junior judgment, is destroyed by the sale under the first judgment, whether redeemed from or not. Admit that the complainant could do so unjust a thing as to retain Seeber's money, which is acknowledged to have been paid to redeem the property, and still have the redemption set aside, the consequence would be that he would then be entitled to the property on his first purchase, which would present quite a different case from the one stated in either the original or amended bill. But the idea is preposterous, that in a court of equity the complainant can have both the land and the money paid for its redemption.

The complainant can claim nothing on his second purchase, made under the junior judgment, for the reason that Bostwick had no such interest in the premises, at the time that sale was made, as could be taken and sold on execution. The premises had been previously sold on an older judgment; and before the

defendant's right to redeem had expired, within less than twelve months the complainant caused them to be sold a second time, on a junior judgment.

The only interest which Bostwick then had was the right to redeem; and to allow this right to be sold on execution would defeat the whole policy of the law allowing redemptions. The right was designed as a favor to the debtor, to afford him an opportunity to save his real estate by the payment, at any time within twelve months, of the price for which it sold, with ten per cent. interest; but it would be entirely cut off by allowing this right to redeem to be sold on a second judgment. Again, such a practice would interfere directly with the mode prescribed by the legislature for redemptions by judgment creditors. The law will not permit them to redeem till the expiration of twelve months from the first sale, and it would be inconsistent with this provision of the statute to allow a judgment creditor to accomplish the same object by a sale made within the twelve months. It was suggested, upon the argument, that, admitting the second sale to have been invalid, and that the purchaser took nothing under it, still the complainant would have the right to have Seeber's title, acquired by the redemption, set aside and the property declared subject to the judgment which the complainant now holds against Bostwick. This can not be, for the redemption by Seeber must be either valid or invalid. If valid, then he is entitled to the property; if invalid, then complainant is entitled to it under his first purchase, which he does not even pretend, nor could he with any show of justice, after receiving and retaining the redemption money paid by Seeber.

In no event has Bostwick any interest in the premises which could now be made subject to complainant's second judgment.

The decree of the circuit court is affirmed, with costs.

Decree affirmed.

FRAUDULENT CONVEYANCE IS NOT LESS SO because made in pursuance of a promise given when grantor was unembarrassed: *Rucker v. Abell*, 48 Am. Dec. 406. In *Reed v. Noxon*, 48 Ill. 324, the principal case is cited to the point that a conveyance made to delay creditors is not purged because the grantor may also have had some other purpose in view.

CREDITOR MAY PURCHASE BONA FIDE OF HIS DEBTOR: See *Brown v. Forer*, 46 Am. Dec. 519; *Worland v. Kimberlin*, 44 Id. 785, and note 788.

JUDGMENT DEBTOR'S RIGHT OF REDEMPTION OF PROPERTY SOLD ON EXECUTION can not be sold under another execution against him. The principal case is cited to this point in *Watson v. Reisig*, 24 Ill. 285; *Blair v. Chamblin*, 39 Id. 526; *Davenport v. Karnes*, 70 Id. 469.

WHERE TWO PERSONS PURCHASE SAME LAND UNDER DIFFERENT JUDGMENTS, it is incumbent on the one purchasing under the second judgment, when attacking the validity of the purchase under the first judgment, to establish facts which will annul such purchase: *Bank v. Evans*, 48 Am. Dec. 734.

KENNEY v. GREER.

[13 ILLINOIS, 432.]

JUDGMENT OF COURT HAVING NO JURISDICTION IS VOID.

NOTHING IS INTENDED TO BE OUT OF JURISDICTION OF SUPERIOR COURT but what specially appears to be so; and nothing is intended to be within the jurisdiction of an inferior court but what is specially alleged.

CIRCUIT COURTS OF ILLINOIS ARE SUPERIOR COURTS OF GENERAL JURISDICTION.

STATUTE PROHIBITING SUING DEFENDANT OUT OF COUNTY WHERE HE RESIDES or may be found gives the defendant a privilege which he may waive, and he must be regarded as having done so unless he makes his objection to the writ in apt time.

COURT MUST PRESUME THAT DEFENDANT HAS WAIVED STATUTORY RIGHT of being sued in his own county, or else that facts existed which authorized a suit against him in the foreign county, unless he insists upon the privilege which the statute gives him, either by plea in abatement or by motion at the proper time.

EJECTMENT by James Kenney and wife, Mary Kenney, against William Greer. Plaintiffs claimed under a sheriff's deed to Mary Kenney of the property in controversy, which was sold to her under an execution issued on a judgment obtained by one Little against Brown, the former owner in fee. The court refused to admit this judgment, and the execution, levy, and sale thereon in evidence. The question is, whether this judgment of the circuit court of Pike county, in the case of *Little v. Brown*, is void for want of jurisdiction in that court. The action was debt on eight promissory notes. The declaration averred that the cause of action accrued in Pike county, but makes no averment as to the residence of the defendant. The summons was directed to the sheriff of Schuyler county, who served it on Brown. Brown made default, and the judgment and other proceedings were regular. The plaintiffs and appellants excepted to the decision of the court refusing to admit the record of *Little v. Brown* in evidence. A verdict was rendered for the defendant. A motion for a new trial was overruled. The plaintiffs took a bill of exceptions and appealed.

J. Grimshaw and R. S. Blackwell, for the appellants.

Warren and Edmonds, for the appellee.

By Court, TREMBULL, J. The chief difficulty in this case arises from decisions of this court heretofore made, respecting the jurisdiction territorially of the circuit court. Were the question now for the first time presented, it could scarcely admit of doubt, that the proper decision would be to hold that the circuit courts of this state were courts of general superior jurisdiction, and that every case should be presumed to be within their jurisdiction, unless the contrary affirmatively appeared.

The only objection to the record offered in evidence was, that it did not appear upon the face of the proceedings that the plaintiff resided in the county in which the suit was brought. The action was instituted in the county of Pike, and the process sent to and served upon the defendant in the county of Schuyler. The declaration alleged that the cause of action arose in the county of Pike, but contained no averment, nor was there anything in the record to show, that the plaintiff resided in that county, nor that the defendant resided in the county of Schuyler, where he was served with process.

The second section of the practice act, R. S. 413, which is but a re-enactment of previous statutes, declares: "It shall not be lawful for any plaintiff to sue a defendant out of the county where the latter resides or may be found, except in cases where the debt, contract, or cause of action accrued in the county of the plaintiff, or where the contract may have been specifically made payable; when it shall be lawful to sue in such county, and process may issue against the defendant to the sheriff of the county where he resides. And in every species of personal actions in law or equity, when there is more than one defendant, the plaintiff commencing his action where either of them resides may have a writ or writs issued, directed to any county or counties where the other defendants, or either of them, may be found."

Under this statute, as expounded by this court in the cases of *Key v. Collins*, 1 Scam. 403; *Gillet v. Stone*, Id. 547; and *Clark v. Clark*, 1 Gilm. 33, the circuit court had no jurisdiction of the case, the record of which was offered in evidence. It was expressly decided in those cases, that an averment that the cause of action arose in the county where the suit was brought was not sufficient to give the court jurisdiction to send its process to a foreign county, without the further averment that the plaintiff resided in the county where the action was commenced. These cases were based upon that of *Clark v. Harkness*, 1 Scam. 56, where the court say: "A circuit court, however, is of lim-

ited jurisdiction, and has cognizance, not of causes generally, but of such only as arise within the county. This renders it necessary, because the proceedings of no court can be deemed valid further than its jurisdiction appears, or may be fairly presumed to set forth upon the record the facts which give the jurisdiction expressly, or such as by legal intendment may render that jurisdiction certain."

The principle of these decisions has been recognized in several other cases: *Evans v. Crosier*, 1 Scam. 548, *Shepard v. Ogden*, 2 Id. 257; *Wakefield v. Goudy*, 3 Id. 183; *Boilvin v. Edwards*, 4 Gilm. 115; *Semple v. Anderson*, Id. 546.

In this last case the court went a step further than in any of the others, and held that the court had not jurisdiction in a case where one of two defendants was served with process in the county where suit was brought, and the other in a different county, without an averment in the declaration to show that the defendant, served in the county where suit was brought, resided in that county. In none of the cases was a plea to the jurisdiction interposed; but they were all decided upon the broad ground, that it was a presumption of law that the circuit court did not have jurisdiction to send its process to a foreign county, unless the facts to give the jurisdiction affirmatively appeared upon the face of the proceedings.

If the principle of these decisions is to be adhered to, and the circuit court, as was said in the case of *Clark v. Harkness*, "is of limited jurisdiction, and has cognizance, not of causes generally, but of such only as arise within the county," and if it be a presumption of law, in the absence of any averment in the record, that such court acts without authority whenever it sends its process to bring in a defendant beyond the limits of the county from whence it issues, it inevitably follows that in such case its proceedings are nullities, and void even collaterally. No principle is clearer than if a court transcends the limits which the law has prescribed for it, and assumes to act where it has no jurisdiction, its decisions will be utterly void, and entitled to no consideration, either as evidence or otherwise; and most emphatically is this so in reference to the decisions of a court of limited jurisdiction, as the circuit court has been denominated in the cases already referred to: *Borden v. Fitch*, 15 Johns. 121 [8 Am. Dec. 225]; *Mills v. Martin*, 19 Id. 83; *Shaefer v. Gates*, 2 B. Mon. 453 [38 Am. Dec. 164]; *Gwin v. McCarrol*, 1 Smed. & M. 368; *Bigelow v. Stearns*, 19 Johns. 39 [10 Am. Dec. 189]; *Lessees of Snyder v. Snyder*, 6 Binn. 488

[6 Am. Dec. 493]; *Smith v. Rice*, 11 Mass. 507; *Sherman v. Ballou*, 8 Cow. 304.

There is sometimes difficulty in determining whether a court has or has not jurisdiction of a particular case; but, that once determined, the consequences that are to flow from the decision are well understood, and the want of jurisdiction being established, the proceedings of such court are absolute nullities, except, perhaps, so far as they may, under some circumstances, be resorted to as a protection to an officer executing their process.

Reference has been made to several cases decided by the supreme court of the United States, for the purpose of showing that a judgment is not void, when it comes in question collaterally, although the court had no jurisdiction to render it. Those cases do not establish such a principle; but they do settle this principle, that the judgments of the circuit courts of the United States are not to be presumed to have been entered without jurisdiction, because the facts to give such jurisdiction do not affirmatively appear upon the face of the proceedings; and that court decided the same way, that the want of jurisdiction was a matter of abatement, and that the jurisdiction would be presumed, although not stated, even in a direct proceeding, if the party failed to make the objection for want of jurisdiction, till after a case had once been remanded by the supreme court: *Washington Bridge Company v. Stewart*, 3 How. 413; *Skillern's Executors v. May's Executors*, 6 Cranch, 267. This court, however, decided differently, in the case of *Semple v. Anderson*, and held, that after a case had been remanded to the circuit court, with directions to overrule a motion in arrest of judgment, it was not too late to object to the jurisdiction.

I am unable to appreciate the reason why the presumption of law as to jurisdiction should be one way when the record is viewed in a direct proceeding, and directly the contrary when the same identical record is inspected collaterally. If it be a presumption of law that the court acts without authority unless the facts to give it jurisdiction appear upon the face of its proceedings, then, whenever such proceedings come in question, and there is an omission to aver the facts that give jurisdiction, the court is bound to intend affirmatively, just as much as if the facts showing the want of jurisdiction were set forth upon the face of the record, that it acted without authority, and in such case there could be no doubt that the proceedings would be void.

The decisions, however, in this state, as to the character of the circuit courts, and the necessity for showing affirmatively in all cases where process is sent out of the county, the facts which, under the statute, would authorize sending it abroad, have not been uniform, and in my opinion the whole foundation of the decisions quoted has long ago been swept away.

In the case of *Brewster v. Scarborough*, 2 Scam. 282, the court use this language: "The circuit courts are courts of general original jurisdiction, and are exclusively vested with jurisdiction in civil cases, except those of justices of the peace, whose jurisdiction is limited to sums of one hundred dollars."

In the case of *Wells v. Mason*, 4 Scam. 88, the court held that a case formerly pending in the municipal court of the city of Alton had been legally transferred to the Madison circuit court, although there was nothing in the record showing that the contingency had happened which would authorize the circuit court to take jurisdiction of the case, upon the principle that "every presumption is to be made in favor of the jurisdiction of a court of general jurisdiction." In the case of *Beaubien v. Brinckerhoff*, 2 Id. 272, the court say: "In relation to superior courts, or courts of record, the law is, that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so; and on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is expressly alleged." The court then inquire to what class of courts the circuit courts of this state belong, and say: "The circuit courts are the only superior courts in the state that possess original and unlimited jurisdiction. They exercise within their respective counties all the powers and jurisdiction of the courts of king's bench and common pleas in England; and although these courts are inferior to the supreme court, because appeals and writs of error lie from their decisions to the supreme court, yet this circumstance does not constitute them inferior courts, in the common-law sense of the term. Courts not of record are denominated inferior courts; because if their proceedings are questioned in the superior courts they must specially show that they acted within their jurisdiction. The circuit courts are pre-eminently the superior courts of this state; and as the municipal court of the city of Chicago possesses concurrent jurisdiction within the city of Chicago and the county of Cook, with the circuit court, it must be considered a superior court. Now, for anything that appears in the declaration at bar, the municipal court may have had jurisdiction.

The note may have been executed in Chicago, which would have given jurisdiction. The plaintiff and defendant may also have resided in Chicago, or the county of Cook. In one of these ways the municipal court may rightly have had jurisdiction, both of the person and of the cause of action; and as it does not appear from the declaration but that some one of the facts existed which would have given the municipal court jurisdiction, this court, upon the rule laid down above, is bound to intend that the municipal court had jurisdiction, both of the person and of the subject-matter of the action."

This case, in my judgment, lays down the correct doctrine, and although professing to be in harmony with the decision in the case of *Key v. Collins*, 1 Scam. 403, it establishes an entirely different principle.

Is the circuit court any the less a superior court or a court of record, when it sends its process to a foreign county, than when it is directed to the sheriff of the county where it sits? Does not the statute expressly authorize process to issue to foreign counties in certain cases, and is it not the doctrine of this case, that nothing is to be presumed to be out of the jurisdiction of a superior court, but that which specially appears to be so? For anything that appeared upon the face of the proceedings in the case of *Key v. Collins*, or that appears upon the record offered in evidence in this cause, the cause of action may have arisen, and the plaintiff have resided in the county where the suit was brought; and if so, why, upon the principle laid down in the case of *Beaubien v. Brinckerhoff*, did not the court have jurisdiction? If the circuit court is a superior court of general jurisdiction when its process issues to the county where it sits, I can not perceive how it becomes an inferior court of limited jurisdiction the moment it issues process to some other county.

In the cases of *Hubbard v. Harris*, 2 Scam. 279, and *Hunter v. Sherman*, Id. 544, the court hold expressly, that a superior court of general jurisdiction will be presumed to have jurisdiction till the contrary is made to appear.

There is another class of cases in which it has been decided, that even when a process is sent to a foreign county, the facts authorizing it to be sent to such county need not affirmatively appear to give the court jurisdiction. The cases *Gillet and Gordon v. Stone*, 1 Scam. 539, and *Haddock v. Waterman*, 11 Ill. 474, could not have been sustained, if it were necessary to the jurisdiction that all the facts authorizing a defendant to be sued out of the county of his residence should appear upon the face

of the proceedings. The declaration in neither of those cases contained any allegation respecting the residence of the defendant, and according to the terms of the statute it is just as essential that the process should be sent to the county where the defendant resides, as it is that the cause of action should have arisen in the county of the plaintiff. The distinction attempted to be drawn between the case of *Haddock v. Waterman* and some of the other cases is more artificial than sound.

Why should the jurisdiction depend upon the existence of facts within the county where it is exercised, any more than upon their existence in the county to which the process is sent, when the law makes no such distinction? or why should the residence of the plaintiff be any more potent in determining the jurisdiction of the court than that of the defendant, when the statute uses the same language as to both? If an averment that the plaintiff resides in the county where the cause of action arose is necessary to authorize the issuing of process to a foreign county, it would seem to be equally necessary to aver that the defendant resided in the county to which the process was sent, when the statute in such a case only authorizes process to "issue against the defendant to the sheriff of the county where he resides." That the residence of the defendant is as important as that of the plaintiff, in determining the jurisdiction of the court, is expressly decided in the case of *Semple v. Anderson*, 4 Gilm. 546, where the only objection to the jurisdiction was that the declaration did not show that Semple was a resident of the county in which the suit was brought, and where he was served with process. The case of *Linton v. Anglin*, 12 Ill. 284, is also directly at war with the decision in the case of *Semple v. Anderson*. In the former case, where it appeared by the record that the defendant did not reside in the county where he was served with process, the court nevertheless sustained jurisdiction, construing the word "resides," "to include the place where the defendant for the time being might be, whether that was his permanent place of residence or not," while in *Semple v. Anderson* the court intended, in the absence of all evidence of the fact in the record, that the defendant did not reside in the county where he was served with process.

In view of all these decisions, which it must be admitted conflict in principle with each other, I feel at liberty to treat the question now presented unembarrassed by any of them. The jurisdiction of the circuit courts of this state, and of the judges thereof in their respective circuits, is extended by statute "over

all matters and suits at common law and in chancery, arising in each of the counties in their respective circuits, where the debt or demand shall exceed twenty dollars:" R. S., c. 29, sec. 29. By a fiction of law, all transitory actions are supposed to arise in the county where the action is brought. The practice in pleading is, after setting forth truly the place where the contract was entered into or the liability incurred, to aver under a *videlicet*, that such place was within the county wherein the suit is pending, and by this allegation, which is not traversable, though untrue in point of fact, all causes of action of a transitory character are brought within the jurisdiction of the circuit court of the particular county where the plaintiff may choose to sue.

Power is given to the circuit courts by section 30 of the revised statutes, "to award throughout the state, and returnable in the proper county, writs of injunction, *ne exeat*, *habeas corpus*, and all other writs and process that may be necessary to the due execution of the powers with which they are or may be vested:" Sec. 31. "The said courts shall respectively have power to hear and determine all cases of treason and other felony, crimes, and misdemeanors of whatever kind, that may be committed within any county or place within their respective circuits, and that may be brought before them by any rules and regulations provided by law." The circuit court is also a court of record, has a seal and clerk: Secs. 35, 40.

If these various statutory provisions, and they have been substantially the same since 1819, do not constitute the circuit courts in this state superior courts of general jurisdiction, I know not what would. They are the only courts of general original jurisdiction in civil and criminal matters in the state, and possess every attribute of courts of record of general jurisdiction proceeding according to the court of the common law.

Assuming, then, that the circuit court of Pike county is a court of general jurisdiction, and I take the rule to be abundantly settled, it is to be presumed to have had jurisdiction of every case adjudicated by it till the contrary appear.

In the case of *Peacock v. Bell*, 1 Saund. 74, which is a leading case upon the question of jurisdiction, it is said: "The rule for jurisdiction is this, that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged.

The rule thus clearly laid down has been recognized and adopted—I had almost said universally—by all courts from that day to this: *Wheeler v. Raymond*, 8 Cow. 311; *Foot v. Stevens*, 17 Wend. 483; *Bloom v. Burdick*, 1 Hill (N. Y.), 139 [37 Am. Dec. 299]; *Sir Thomas Cooke Winford v. Powell*, 2 Ld. Raym. 1310; *Mills v. Martin*, 19 Johns. 33; Bac. Abr., tit. Courts, D, 3.

Apply the rule, above laid down, to the record of the Pike circuit court, offered in evidence, and there can not be a doubt that the objection that the cause was not within its jurisdiction is wholly untenable.

In the absence of anything in the record to show where the parties resided, the presumption of law is that their residences were such as to give the circuit court of Pike county jurisdiction over their persons. Unless such be the presumption, there is no distinction in this respect between courts of general and of limited jurisdiction.

If it be necessary to set forth upon the face of the proceedings the facts which authorized the circuit court of Pike county to send its process to a foreign county, then the rule that courts of general jurisdiction are to be presumed to have had jurisdiction till the contrary appears means nothing, for there is no need of presumption where there is direct proof.

The statute prohibiting the suing a defendant out of the county where he resides or may be found, except in certain cases, was passed subsequently to the acts conferring upon the circuit court general jurisdiction of all actions arising in the county, and was enacted for the benefit of defendants, not to limit the jurisdiction of the circuit courts. Its object was to restrict a practice which had before obtained of suing the defendant in any county of the state which the creditor might elect, and thereby prevent vexation to a defendant in being wantonly sued in a remote county.

The statute gives the defendant a privilege, and being a privilege he has consequently the right to waive it, and must be regarded having done so, unless he makes his objection to the writ in apt time; for the exception is not to the jurisdiction of the circuit court, which, as before shown, has cognizance of all transitory actions, but to the writ as sued out and returned in a wrong county: *Cleveland v. Welsh*, 4 Mass. 591; *Briggs v. Bank of Nantucket*, 5 Id. 94; *Hughes v. Martin*, 1 Ark. 455.

It was enacted by a statute of Alabama as follows: “No freeholder of this territory shall be sued out of the county of his

permanent residence;" and the courts of that state have held that the proper mode of taking advantage of this statute by a defendant, when sued in a foreign county, is to plead in abatement.

So in New Hampshire, under a statute which declares "that all personal or transitory actions, where both parties are inhabitants of this state, may be commenced in the county wherein either of the parties to the suit may be an inhabitant, and not elsewhere in this state," the courts of that state hold, that if the objection appear on the face of the writ, the writ may be quashed on motion; otherwise the objection must be taken by a plea in abatement: *Eames v. Carlisle*, 3 N. H. 130. Unless, therefore, the defendant, when sued in a foreign county, insists upon the privilege which the statute gives him, either by plea in abatement or by motion at the proper time, the court is bound to presume, either that he has waived his right of being sued in his own county, or else that the facts existed which authorized a suit against him in the foreign county.

So far from holding that the record offered in evidence was void for want of jurisdiction over the person of the defendant, we are of opinion that the objection that the defendant was sued out of the county of his residence could not have been taken advantage of by the defendant in the original action, except by plea in abatement, or perhaps by motion interposed before pleading to the merits of the action; and the cases heretofore decided conflicting with this view must be regarded overruled.

The judgment of the circuit court is reversed, and the cause remanded.

Judgment reversed.

CATON, J., concurred that the judgment should be reversed, but for different reasons than those expressed in the opinion, as stated by Trumbull, J. He was adverse to overruling the cases overruled in the above opinion.

JUDGMENT OF COURT HAVING NO JURISDICTION IS VOID: See *Rogers v. Evans*, 52 Am. Dec. 390, and note.

OBJECTION TO INSUFFICIENCY OF PROCESS is waived by not taking advantage of it in time: *Cartwright v. Chabert*, 49 Am. Dec. 742. Matter in abatement should be pleaded before judgment: *May v. State B'k of N. C.*, 40 Id. 726.

JURISDICTION OF COURT OF GENERAL JURISDICTION IS PRESUMED, but proceedings of justices' courts must show jurisdictional facts: See *Palmer v. Oakley*, 47 Am. Dec. 41, and *Spear v. Carter*, 48 Id. 688, and cases cited in

the notes thereto. The principal case is cited to the point that the circuit court of Illinois is a court of general jurisdiction, and nothing is presumed to be out of its jurisdiction but what specially appears to be so, in *Ralston v. Hughes*, 13 Ill. 473; *Hamilton v. Dewey*, 22 Id. 491; *Dunbar v. Hollowell*, 34 Id. 170; *Haywood v. Collins*, 60 Id. 342; *Swearingen v. Gulick*, 67 Id. 211; *Wallace v. Cox*, 71 Id. 549. Appellate court can not presume the existence of facts in support of a judgment, contrary to the allegations of the party in whose favor it is rendered and the admissions in the record: *Lockett v. Townsend*, 49 Am. Dec. 723.

OBJECTION TO JURISDICTION OF DEFENDANT, WAIVER OF, by appearance and pleading in bar: See *Perkins v. Perkins*, 18 Am. Dec. 120; *Carroll v. Lee*, 22 Id. 350; *Woodford v. Dugan*, 35 Id. 52; *Little v. Little*, 32 Id. 317, and note; *Hanna v. McKensie*, 43 Id. 122, and note citing prior cases; *Ponder v. Moeely*, 48 Id. 194.

WHERE PROCESS ISSUES TO FOREIGN COUNTY, the declaration need not contain an averment that the defendant resides in the county from which the process issues. The principal case is cited to this effect in *Gillilan v. Gray*, 14 Ill. 416; *Hamilton v. Dewey*, 22 Id. 491.

PLEA OF DEFENDANT TAKING ADVANTAGE OF HIS BEING SUED IN WRONG COUNTY is a plea in abatement, and this can not be set up by demurrer or urged on writ of error after default. The principal case is cited to this effect in *Waterman v. Tuttle*, 18 Ill. 292; *Hamilton v. Dewey*, 22 Id. 491; *Hardy v. Adams*, 48 Id. 532; *Scott v. Waller*, 65 Id. 182, 184; *Wallace v. Cox*, 71 Id. 549; *Drake v. Drake*, 83 Id. 527. The rule that where there is no demurrer to the jurisdiction of the court below it is too late to raise the objection on the appeal applies only to cases of concurrent jurisdiction, and has no place where there is an entire want of jurisdiction of the subject-matter: *Green v. Creighton*, 48 Am. Dec. 742.

PLEA IN ABATEMENT BY DEFENDANT, taking advantage of his being sued out of the county of his residence, must be filed in "apt time." The principal case is cited to this point in *Halloway v. Freeman*, 22 Ill. 202; *Toledo etc. R. Co. v. Williams*, 77 Id. 356; *Drake v. Drake*, 83 Id. 528.

McJILTON v. LOVE.

[13 ILLINOIS, 486.]

COURTS OF ONE STATE ARE BOUND TO GIVE SAME FAITH AND CREDIT to judicial proceedings had in a sister state that are by law or usage given to them in the courts of that state.

PENDENCY OF SUIT IN ONE STATE CAN NOT BE PLEADED IN BAR or abatement of a second action in another state between the same parties and for the same cause of action.

PENDENCY OF WRIT OF ERROR CAN NOT BE PLEADED IN ABATEMENT of another action in the same state, unless the writ of error operates as a *supersedeas*, and not even then if the writ of error was sued out after the commencement of the second action.

REVERSAL OF JUDGMENT RESTORES PARTIES TO THEIR ORIGINAL RIGHTS, so far as this can be done without prejudice to third persons.

PLAINTIFF HAVING RECEIVED BENEFIT FROM JUDGMENT AFTERWARDS REVERSED must make as full restitution to the defendant as the circumstances of the case will permit, and the defendant will have his appropriate action against him.

RIGHTS OF THIRD PERSONS ARE NOT AFFECTED BY REVERSAL OF JUDGMENT, or their title to property acquired under the erroneous judgment divested.

DEFENDANT MUST LOOK TO PLAINTIFF ONLY FOR REDRESS in case of reversal of a judgment under which, prior to reversal, third persons' rights have become involved.

ASSIGNEE OF JUDGMENT TAKES IT SUBJECT TO ALL EQUITIES subsisting between the original parties, and is not entitled to protection as *bona fide* purchaser under an erroneous judgment.

TRANSFER OF JUDGMENT DOES NOT VEST LEGAL INTEREST IN ASSIGNEE, but, as it is a mere chose in action, the beneficial interest only passes.

INJUNCTION AGAINST PROCEEDINGS UNDER JUDGMENT IN ONE STATE, obtained upon a judgment in another state which has subsequently been reversed, will be granted when the defendant is guilty of no laches in the assertion of his rights.

THIS was a bill in chancery, filed by Love against McJilton, Fairfield, Field, Hall, and others, praying for injunction and other relief. The injunction and other relief prayed was granted. From this decree McJilton prayed for and obtained this appeal. The facts are stated in the opinion of the court.

Davis and Edwards, for the appellant.

J. Gillespie and S. T. Logan, for the appellee.

By Court, **TREAT, C. J.** In May, 1846, Arthur Fairfield recovered a judgment against James Love in the circuit court of the county of St. Louis, in the state of Missouri, for eight hundred dollars. Field and Hall were the plaintiff's attorneys. In October, 1846, the sheriff returned the execution issued thereon, satisfied in full, by the order of the plaintiff. In November, 1846, Field and Hall moved the court to vacate the entry of satisfaction, and award an execution on the judgment to enable them to collect the sum of five hundred dollars, on the ground that so much of the judgment was assigned to them by Fairfield, with the knowledge of Love, before the return of the execution. On the ninth of January, 1847, the court set aside the entry of satisfaction as to five hundred dollars, and directed an execution to issue to collect that amount for the benefit of Field and Hall. Love resisted the motion, and took a bill of exceptions to the decision of the court. On the twelfth of January, 1847, Love entered a motion to set aside the order vacating the entry of satisfaction, and awarding an execution on the judgment. The

motion was overruled on the eighth of February, 1847, and a bill of exceptions taken by Love. He afterwards sued out a writ of error, and at the March term, 1850, of the supreme court of Missouri, the order of the circuit court, sustaining the motion of Field and Hall, was reversed, on the ground that the assignment of a part of the judgment was not binding on Love, unless made with his consent: See *Love v. Fairfield*, 13 Mo. 300.

In March, 1847, Field and Hall, in the name of Fairfield, but to their use, sued out of the Madison circuit court, in this state, an attachment against Love, which was levied on certain real estate. They declared on the record of the judgment obtained in Missouri, and alleged that five hundred dollars thereof remained due and unpaid. Love pleaded *nul tiel record* and payment. On the trial, in August, 1838, Field and Hall read in evidence the record of the judgment. Love introduced a transcript of the record, which included the execution and the return of the sheriff. Field and Hall then produced a transcript of the proceedings, subsequent to the return of the execution. On this evidence the court rendered a judgment against Love for five hundred and sixty-nine dollars and nine cents, and awarded a special execution against the property attached. Love prosecuted an appeal to this court, where the judgment was affirmed, at the December term, 1848. See *Love v. Fairfield*, 5 Gilm. 303. Field and Hall subsequently assigned the judgment to James T. McJilton. On the twenty-eighth of April, 1849, under a special execution issued on the judgment, the real estate attached was exposed to sale, and bid in by McJilton for six hundred and thirty-one dollars, who received a certificate of purchase from the sheriff.

On the twenty-sixth of April, 1850, Love filed a bill in chancery, in the Madison circuit court, against Fairfield, Field and Hall, and McJilton, setting forth, among other things, the foregoing facts, and alleging that McJilton purchased the judgment with full knowledge of all the previous proceedings. He prayed that the sale might be set aside, and the defendants enjoined from asserting any rights under the judgment; and in the event that relief should be denied, he prayed for relief to redeem the lands from the sale, and brought into court the amount of money necessary for the purpose. An injunction was granted. McJilton, in his answer, alleged that he purchased the judgment for a valuable consideration, and without any knowledge of the judgment in Missouri, or of any of the

subsequent proceedings thereon. On the final hearing of the cause, in September, 1851, the injunction was made perpetual, and leave given to Love to withdraw the money deposited. McJilton prosecuted an appeal.

Under the constitution of the United States and the legislation of congress in pursuance of its provisions, the courts of this state are bound to give the same faith and credit to judicial proceedings had in Missouri that are by law or usage given to them in the courts of that state. When such proceedings are drawn in question before our courts, their regularity and validity are to be determined, not according to our laws, but with reference to those of Missouri. If valid and binding on the parties by the laws of Missouri, the proceedings must be held to have the like force and effect in this state: *Mills v. Duryee*, 7 Cranch, 481; *Hampton v. McConnel*, 3 Wheat. 234; *Bimeler v. Dawson*, 4 Scam. 536 [39 Am. Dec. 430].

The original judgment was satisfied of record by the return of the sheriff. While the entry of satisfaction remained operative, the judgment was wholly without vitality. The record formed no basis for further proceedings. An action of debt could not be maintained upon the judgment; nor could final process issue for its collection. But the order of the court vacating the entry of satisfaction as to five hundred dollars imparted to that extent vitality to the judgment. It authorized Field and Hall, in the name of Fairfield, to bring an action on the record or to sue out another execution on the judgment. We are bound to regard this as the legal effect of the order under the laws of Missouri. It was considered by the parties as a judicial determination of their rights. It was so regarded by the courts of that state. The highest court in the state entertained a writ of error, to inquire into its validity. And this action of the courts furnishes the most satisfactory evidence of the laws of Missouri, and of the operation and effect of the order. What effect this court would give to a like order of one of our circuit courts is another question. If the order was binding on the parties by the laws of Missouri, it must be held to have the same force and effect in this state.

In this state of the case, the parties, having the control of the judgment, come into Illinois and sue out an attachment against the estate of Love, to coerce payment of the amount appearing to be due by the record. He pleaded *nul tiel record*, and thus put them upon strict proof of the existence of the judgment. He likewise attempted to show that the judgment was fully

satisfied; but the order, setting aside the entry of satisfaction, effectually concluded him. It was a direct adjudication of the court in which the proceedings were had, that the judgment still continued operative and unsatisfied. So long as the order remained unreversed, Love was precluded from sustaining his plea of payment. If he had offered to introduce proof of payment to Fairfield, he would have encountered the conclusive objection that the court, before which the judgment was obtained, had judicially determined that the payment was made in fraud of the rights of Field and Hall, and, therefore, could not be interposed to defeat an action brought for their benefit. Nor could he have relied on the pendency of a writ of error in Missouri, as a defense to the action in this state. The pendency of a suit in one state can not be pleaded in bar or abatement of a second action in another state, between the same parties and for the same cause of action: *Bowne v. Joy*, 9 Johns. 221; *Walsh v. Durkin*, 12 Id. 99. And the pendency of a writ of error can not be pleaded in abatement of another action in the same state, unless the writ of error operates as a *supersedeas*, and not even then if the writ of error was sued out after the commencement of the second action: *Hailman v. Buckmaster*, 3 Gilm. 498; *Jenkins v. Pepoon*, 2 Johns. Cas. 312; *Prinn v. Edwards*, 1 Ld. Raym. 47.

Under these circumstances, it is manifest that Love was not guilty of any laches in the assertion of his rights. He resorted to the only effectual means to remove the obstacle in the way of a perfect defense to the action in this state; the prosecution of a writ of error to reverse the order vacating the entry of satisfaction. But the course of proceeding in Missouri did not enable him to accomplish that object until the judgment was recovered in this state, and his lands subjected to sale for its satisfaction.

What was the effect of that reversal upon the rights of the parties? It restored the entry of satisfaction, and left the judgment discharged of record. It exonerated Love from the payment of any part of the judgment to Field and Hall. It left the judgment in this state without the least foundation upon which to rest. The law is well settled, that if a judgment is reversed, the parties are to be restored to their original rights, so far as it can be done without prejudice to third persons. If the plaintiff has derived any benefit from the judgment, he must make as full restitution to the defendant as the circumstances of the case will permit. If he has received payment in money from the defendant, the latter can recover it back in an

action of *indebitatus assumpsit*. If he has obtained money by the sale of the property of the defendant, the latter may recover it as so much money had and received to his use. If he has purchased in property under the judgment, and still retains the ownership, the defendant may recover the specific property in the appropriate action. If he has aliened the property, he is responsible to the defendant for its value. But the rights of third persons are not affected. Their title to property acquired under an erroneous judgment is not divested by its reversal. In such case the defendant must look to the plaintiff for redress. These principles are too well established by authority to require further discussion: *Bank of United States v. Bank of Washington*, 6 Pet. 8; *Clark v. Pinney*, 6 Cow. 297; *Green v. Stone*, 1 Har. & J. 405; *McLagan v. Brown*, 11 Ill. 519; *Steelman v. Cheeseman*, Pen. 120; *Hubbell v. Broadwell's Adm'rs*, 8 Ohio, 120.

The complainant made out a clear case for the interposition of a court of equity, as against Fairfield, and Field and Hall. And McJilton occupies no more favorable position. He is not a stranger to the judgment. He is not entitled to protection, as a *bona fide* purchaser under an erroneous judgment. He was the assignee of the judgment, and had the control of the execution, when he became the purchaser of the lands. By the assignment, he succeeded to no greater rights than Field and Hall had under the judgment. He took the judgment, subject to all the equities subsisting between the original parties: *Himes v. Barnitz*, 8 Watts, 39; *Chamberlin v. Day*, 3 Cow. 353; *Jeffries v. Evans*, 6 B. Mon. 119 [43 Am. Dec. 158]; *Maghee v. Kellogg*, 24 Wend. 32. A judgment can not be so transferred as to vest the legal interest in the assignee. It is a mere chose in action, and the beneficial interest only passes by the assignment. The assignee, however, has the right to enforce its collection for his benefit, and for that purpose to use the name of the party possessing the naked legal interest. And the courts will protect him against the acts of the assignor, and also against the acts of the debtor, after he has notice of the assignment. But he takes the judgment subject to all defenses that existed against it in the hands of the party from whom he received it.

The decree of the circuit court is affirmed.

Decree affirmed.

REVERSAL OF JUDGMENT, RESTITUTION OF PROPERTY UPON: *Fleming v. Riddick's Ex'r*, 50 Am. Dec. 119, and note citing prior cases. The principal case is cited in *Smith v. Zent*, 83 Ind. 87, to the point that where property is sold upon a judgment which is afterwards reversed, the owner may recover

from the execution creditor the amount received from such sale, or the value of the property.

JUDGMENTS AND PROCEEDINGS OF SISTER STATE: See cases cited in note to *Ever v. Coffin*, 48 Am. Dec. 589; *Settle v. Allison*, 52 Id. 393. Such judgment is impeachable for fraud or want of jurisdiction: *Davis v. Smith*, Id. 279. To the point that the same faith and credit are to be given the judgments and proceedings of a sister state as they receive in the courts of that state, the principal case is cited in *Lawrence v. Jarvis*, 32 Ill. 310.

PENDENCY OF ACTION IN ANOTHER JURISDICTION, WHEN PLEADABLE: See *Lowry v. Hall*, 37 Am. Dec. 495. Pendency of suit in one state can not be pleaded in bar or abatement of a second action in another state, even though it be between the same parties and for the same cause of action. The principal case is cited to this point in *Allen v. Watt*, 69 Ill. 658. In *Loring v. Marsh*, 2 Cliff. 322, it is cited to the point that the pendency of another action in a state court is not a good plea in abatement of a suit in a circuit court.

RIGHTS OF THIRD PERSONS ACQUIRED UNDER ERRONEOUS JUDGMENT are not divested by a reversal thereof: See *Ponder v. Mosely*, 48 Am. Dec. 194; *McCormick v. McClure*, 39 Id. 441; *Saulet v. Dreux*, 15 Id. 173; *Phillips v. Johnson*, 12 Id. 505; *Wood v. Jackson*, 22 Id. 603; *Taylor v. Boyd*, 17 Id. 603; *Porter v. Robinson*, 13 Id. 153; *Woodcock v. Bennet*, 13 Id. 568; *Dabney v. Manning*, 17 Id. 597. The principal case is cited as authority on this point in *Goudy v. Hall*, 36 Ill. 320; *Guiteau v. Wisely*, 47 Id. 436; *Wadhams v. Gay*, 73 Id. 422; *Horner v. Zimmerman*, 45 Id. 23; *Mulford v. Stalzenback*, 46 Id. 309; *Feaster v. Fleming*, 56 Id. 460; *Galpin v. Page*, 18 Wall. 375.

ASSIGNEE OF JUDGMENT TAKES IT SUBJECT TO ALL EQUITIES existing between the original parties: See *Graves v. Woodbury*, 40 Am. Dec. 296; *Jeffries v. Evans*, 43 Id. 158, and cases cited in the notes thereto. The principal case is cited to this point in *Hughes v. Trahern*, 64 Ill. 54; *Padfield v. Green*, 85 Id. 531.

WHEN JUDGMENT WILL BE ENJOINED: See *Fowler v. Lee*, 32 Am. Dec. 172; *Jones v. Commercial Bank of Columbus*, 35 Id. 419; *Emerson v. Udall*, 37 Id. 604; *Threlkelds v. Campbell*, 44 Id. 384; *Hamilton v. Adams*, 50 Id. 150. The principal case is cited in *Babcock v. McCamant*, 53 Ill. 217, to the point that injunction will be granted against proceedings on a judgment obtained on a judgment of another state since reversed.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

HODDY v. HOARD.

[2 INDIANA, 474.]

GRANTOR CAN NOT BE REQUIRED TO EXECUTE SECOND DEED where one previously executed has been lost or destroyed while in the grantee's possession.

AFFIDAVIT OF LOSS OF INSTRUMENT IS NECESSARY to sustain a bill in equity seeking relief in cases of such supposed loss.

ERROR. Bill in chancery. The opinion states the case.

J. B. Howe, for the plaintiff.

E. A. McMahon, for the defendant.

By Court, SMITH, J. Hezekiah Hoard filed a bill in chancery against Washington Hoddy, alleging that in the year 1838 he purchased a certain tract of land of the said Hoddy, for a valuable consideration, which he paid, and received a deed; that a few days after the deed had been received the complainant's house took fire, and the deed, together with other property, was destroyed; and that the complainant was thus left without any evidence whatever of his title to the land he had purchased.

The bill further alleges that the complainant had frequently requested Hoddy to give him another deed to the premises, offering to pay all the expenses of said second deed, but that Hoddy refused to comply with this request. The prayer is that Hoddy be compelled to execute a deed for the premises, and for general relief. Hoddy being a non-resident, notice was given him of the pendency of the suit by publication, and upon his failing to appear, a decree was rendered *pro confesso*. The de-

cree ordered a commissioner to make a deed conveying to Hoard all the right, title, and interest of Hoddy, and of all previous claims under him, in the said premises, in as full and perfect a manner as the same were conveyed by the deed mentioned in the bill of complaint.

A deed was accordingly made and confirmed by the court conveying all the right, title, and interest of Hoddy in and to said premises to Hoard, "in as full, complete, and ample a manner as the said Hoddy did or could hold the same previous to the execution of the deed heretofore made and destroyed by fire as specified" in the bill of complaint.

The court also decreed that Hoddy should pay the costs of the proceedings. This decree is erroneous. We know of no principle in equity jurisprudence by which a grantor can be required to execute a second deed where one previously executed has been lost or destroyed while in the possession of the grantee. Courts of equity will, indeed, establish the possession of a party who claims title under a deed which has been lost or destroyed, or grant such other relief as the particular circumstances of the case may require; but this ought not to be done at the expense of him who executed the lost instrument, for he is under no obligation to preserve the evidences of the grantee's title, or to furnish a new deed if the deed originally delivered to him should be lost.

In cases of supposed lost instruments where relief is sought, an affidavit of the loss of the instrument is necessary to sustain the bill: 1 Story's Eq. Jur. 88. In this case there was no such affidavit. The bill is not sworn to, and it contains no description of the contents of the deed alleged to be lost, or of the title or interest conveyed by it. The complainant merely states that he has lost a deed for a certain tract of land, delivered to him by the defendant, and prays that the defendant may be compelled to make him another. The bill, therefore, presents no grounds for equitable relief.

The decree is reversed. Cause remanded with instructions to dismiss the bill at the costs of the complainant. Costs here.

LOST OR DESTROYED DEED—EXECUTION OF ANOTHER, WHEN DECREE: *Blight's Heirs v. Banks*, 17 Am. Dec. 136; *Wade's Heirs v. Greenwood*, 40 Id. 759; *Hord v. Baugh*, 46 Id. 91.

EQUITY JURISDICTION IN CASE OF LOST OR DESTROYED INSTRUMENTS, IN GENERAL.—Lost bonds: *Carter v. Jones*, 49 Am. Dec. 425; *Edwards v. McKee*, 13 Id. 474, and notes thereto; lost negotiable notes: *Thayer v. King*, 45 Id. 571; *Edwards v. McKee*, 13 Id. 474, and notes; lost wills: *Buchanan v. Matlock*, 47 Id. 622; *Morningstar v. Selby*, 45 Id. 579, and notes; and see *Dickey v. Malechi*, 54 Id. 130.

ADMISSIBILITY OF PAROL EVIDENCE TO PROVE LOST WRITING: *Purden v. Alden*, 34 Am. Dec. 51, and note.

AFFIDAVIT OF LOSS REQUISITE TO SUSTAIN BILL: *Carlisle v. Ramsey*, 4 Ind. 243, citing the principal case.

DAVIS v. LANE.

[2 INDIANA, 543.]

JUDGMENT IS SHOWN SUBSTANTIALLY TO HAVE BEEN RENDERED BY COURT OF RECORD of another state by a declaration in debt on such judgment, in the ordinary form in debt on a domestic judgment of a court of record, describing the judgment, and saying, "as by the record and proceedings thereof remaining in said court fully appears," etc.

GROUND FOR PLEA OF NIL DEBIT NOT FURNISHED, because a declaration in debt on a judgment of another state did not show that the court had jurisdiction of the person of the defendant.

NIL DEBIT CAN NOT BE PLEADED TO SUIT ON JUDGMENT of a court of another state.

ERROR. Debt. The opinion states the case.

A. P. Hovey, for the plaintiffs.

J. Pitcher, for the defendant.

By Court, BLACKFORD, J. This was an action of debt, brought by Lane and one Thomas against Davis, on the judgment of a court in another state. The declaration is to the following effect: For that whereas the plaintiffs, heretofore, to wit, at the May term of the circuit court for the county of Claiborne and state of Mississippi, held at Port Gibson, in said county, on, etc., by the consideration and judgment of said court, recovered against the defendant the sum of one hundred and forty-two dollars and eighty cents, the sum above demanded, which, in and by said court, was then and there adjudged to the plaintiffs for their damages which they had sustained by reason of the non-performance by the defendant of certain promises and undertakings then lately made by the defendant to the plaintiffs, and also their costs and charges by them about their suit in this behalf expended, which costs and charges amount to, etc., whereof the defendant was convicted, as by the record and proceedings thereof remaining in said court fully appears; which judgment remains in full force, etc. Whereby an action hath accrued, etc. Plea, *nil debit*. General demurrer to the plea, and judgment for the plaintiffs, one of whom has since died.

The defendant contends that the declaration does not aver

that the judgment sued on was rendered by a court of record, or by a court having jurisdiction of the person of the defendant; and that, therefore, *nil debit* was a good plea. The declaration is in the ordinary form in debt on a domestic judgment of a court of record: 2 Ch. Pl. 482. It describes the judgment of the court, and then says, "as by the record and proceedings thereof remaining in said court fully appears," etc. We think, therefore, that it is shown substantially that the court rendering the judgment was a court of record. The circumstance that the declaration does not show, in express terms, that the court had jurisdiction of the person of the defendant can be no ground for the plea of *nil debit*. That plea is only admissible where the suit is founded on a matter of fact. The foundation of the present suit is a judgment of a court of record in Mississippi. Had the suit been brought in that state, the defendant could not have pleaded *nil debit*, because the common law, which must be presumed to be in force there, does not permit such plea to a suit on a record. By the constitution of the United States, and an act of congress of 1790, the judgment of a court in any one of the states has the same faith and credit in the other states that it has in the state where it was rendered: Const., art. 4, sec. 1; 1 Stats. at Large, 122. The judgment before us, therefore, being matter of record in Mississippi, must be treated as matter of record here; and the general issue to the suit is not *nil debit*, but *nul tiel record*.

The supreme court of the United States long since decided that *nil debit* could not be pleaded to a suit on the judgment of a court of another state: *Mills v. Duryee*, 7 Cranch, 481; *Hampton v. McConnel*, 3 Wheat. 234. That court recently referred to those cases, and said that the language of the court in *Mills v. Duryee* does not admit of the interpretation that a plea not denying the judgment, but which resists it upon the ground of a release, payment, or a presumption of payment from the lapse of time, may not be pleaded. The court said also, at the same time, that the decision in *Hampton v. McConnel* was not intended to exclude such defenses as those first mentioned, or such as inquire into the jurisdiction of the court which rendered the judgment: *McElmoyle v. Cohen*, 13 Pet. 812. That case does not interfere with the previous decisions of the court against the plea of *nil debit*, on general demurrer, in suits like the present.

Were the plaintiff compelled in these cases to join issue on the plea of *nil debit*, the defendant would have the right to prove that the judgment sued on ought not to have been rendered, on

the ground that the cause of action had not been established. There would, on such issue, be a retrial of the merits of the original suit, which is certainly not allowable.

This decision accords with the opinion expressed by the court in *Holt v. Alloway*, 2 Blackf. 108.

The judgment is affirmed, with costs.

JUDGMENTS OF COURTS OF ANOTHER STATE, EFFECT OF, in general: *Davis v. Smith*, 48 Am. Dec. 279, and note referring to prior cases; and see *Dudley v. Lindsey*, 50 Id. 522, and note, on the effect of judgments of courts of the United States.

NIL DEBIT CAN NOT BE PLEADED TO DEBT ON JUDGMENT OF ANOTHER STATE: *Shumway v. Stillman*, 15 Am. Dec. 374; *Newcomb v. Peck*, 44 Id. 340; *Buchanan v. Port*, 5 Ind. 285, citing and following the principal case; and in *Indianapolis etc. R'y v. Risley*, 50 Id. 62, where an answer to a suit on a judgment by the supreme court of New York was that defendants "do not owe the said sum of money above demanded, or any part thereof," etc, the court said it was "the old plea of *nil debit*, and is an insufficient answer," citing the principal case; but in *Hall v. Williams*, 17 Am. Dec. 356, it was said that under *nil debit* pleaded to debt on a judgment of a sister state, it seems that the defendant may show want of jurisdiction to render the judgment; and for a case of an action at law on a decree of a court of equity of another state, where both the pleas of *nil debit* and *nul tiel record* were held bad on demurrer, see *Evans v. Tatem*, 11 Id. 717; but if the action be brought upon a foreign judgment, *nil debit* may be pleaded: *Williams v. Preston*, 20 Id. 179.

THE PRINCIPAL CASE IS FURTHER CITED in *Haines v. Kent*, 11 Ind. 126, to the point that in a suit upon judgments taken by confession for a *bona fide* debt, the defendant can not set up as fraud in obtaining the judgments that the plaintiff had failed to perform his part of a contract which had been entered into by him as an inducement to such confession.

DOE EX DEM. HOSIER v. HALL.

[2 INDIANA, 556.]

BONA FIDE PURCHASER AT SHERIFF'S SALE WILL HOLD LAND where the judgment creditor had conveyed it away previously to the judgment against him, but the deed had not been put upon record within the time required by statute, nor prior to the recording of the sheriff's deed.

PURCHASER AT SHERIFF'S SALE STANDS, IN RELATION TO REGISTRATION LAW, as though he were a purchaser at the same date from the execution defendant himself.

RECORDING OF CONVEYANCE OF REAL ESTATE IN INDIANA is required within ninety days from its execution, be it executed without or within the state.

ERROR. Ejectment. The opinion states the case.

J. Morrison and S. A. Major, for the plaintiff.

R. Brackenridge, for the defendant.

By Court, PERKINS, J. Ejectment for a tract of land in Wells county. The suit is upon the demise of Robert Hosier, and is against Adnah Hall, who was in possession under a sheriff's deed. Judgment below for the defendant.

It appears that in 1839 Peter Studebaker, then being the legal owner of the land in question, conveyed it, in fee simple, to Zimri Hosier, of Ohio. The conveyance was duly recorded in Wells county. In September, 1844, James R. Greer, agent of said county, obtained judgment in the Wells circuit court against said Zimri, on execution upon which, on the eleventh of October, 1844, the sheriff of the county sold said land to the defendant, Hall, who received the sheriff's deed on the day of sale, had the same immediately recorded, and was in possession in August, 1846, when this suit was commenced. The land sold for more than the amount of the judgment, and said Zimri received the overplus.

On the fourteenth of December, 1841, said Zimri Hosier made a deed at Montgomery county, Ohio, conveying said land to Robert Hosier, the lessor of the plaintiff. This deed was not filed for record till the eleventh of July, 1846. There is no evidence that Robert ever took possession, or that Hall had any notice of his purchase; nor does it appear whether the land was occupied or vacant at the sheriff's sale.

Here, then, is a *bona fide* purchaser at sheriff's sale, of land which the judgment debtor had conveyed away previously to the judgment against him, but the deed for which had not been put upon record within ninety days of its execution, nor prior to the recording of the sheriff's deed; and the question is, Will the purchaser at sheriff's sale hold the land?

In *Orth v. Jennings*, 8 Blackf. 420, this court held that a purchaser at sheriff's sale stood, in relation to the registration law, as though he were a purchaser, at the same date, from the execution defendant himself; and such a purchaser, under the circumstances of this case, would hold, unless the fact that the deed by the execution defendant, Zimri Hosier, to the lessor of the plaintiff, Robert Hosier, was made in another state, would prevent. It is contended that section 7, page 312, of the revised statutes of 1838, in force when the deed under consideration was made, did not make void, as to a subsequent purchaser, an unrecorded deed executed in another state, and the language of that section alone well justifies such a conclusion; but considered in connection with section 11, page 313, of the same statutes,

and with the evils that must result from a different construction, we think the legislature intended that all deeds conveying land in this state should be recorded, be they executed wheresoever. And even if we are wrong in this, we think that section 25, page 418, revised statutes of 1843, should be so construed as to operate upon the deed in question. That section requires every conveyance of any real estate in this state to be recorded within ninety days from its execution. This section came into force in April, 1844, and the deed from Zimri to Robert Hosier was not recorded till July, 1846. The sheriff's deed to Hall was recorded in October, 1844. It is true that a deed executed before the passage of the foregoing section could not be recorded within ninety days from the date of the deed, but it could in ninety days from the coming into force of the section, and there can be no hardship in giving it a construction requiring deeds to be so recorded; and did the statute of 1838 not apply to every deed, the mischief to be prevented would demand such a construction of the law of 1843.

The judgment is affirmed, with costs.

RIGHTS OF PURCHASER AT EXECUTION SALE, AS REGARDS PRIORITIES.—The doctrine of the principal case, that a purchaser at a sheriff's sale stands, in respect to the registration laws, as though he had purchased from the execution defendant, was approved in *Rosser v. Bingham*, 17 Ind. 544, and applied to a case where a decree for the specific performance of a contract to purchase land was obtained, but the deed ordered to be made by a commissioner, although recorded among the records of the court, was not recorded in the recorder's office until several years later, during which time the land had come into the hands of one who purchased for a valuable consideration, in good faith and without notice, and who had his deed duly recorded, the court holding that the title by the decree was thereby defeated. A *bona fide* purchaser without notice, at an execution sale, before he receives a sheriff's deed, is not affected by notice subsequently acquired of a prior equity: *Halley v. Oldham*, 41 Am. Dec. 262; *Oviatt v. Brown*, 45 Id. 539. A purchaser of land, held by an unregistered deed, at an execution sale, is clothed by the sheriff's deed with all the rights of the judgment debtor: *Vance's Heirs v. McNairy*, 24 Id. 553; such a purchaser succeeds to the title of the defendant, and is affected by existing equities against him: *Polk v. Gallant*, 34 Id. 410; and he takes subject to a prior mortgage to which the sale is announced to be subject, although the levy was not made subject thereto, and although the mortgage was not the first incumbrance: *Tower's Appropriation*, 42 Id. 319; but if the purchaser is also the plaintiff in execution, to whom the money is payable, and who therefore parts with no money, he is not a *bona fide* purchaser for a valuable consideration: *Williams v. Hollingsworth*, 47 Id. 527.

JUDGMENT LIEN PREFERRED TO PRIOR UNRECORDED DEED: *Reed v. Austin's Heirs*, 45 Am. Dec. 336; and see *Withers v. Carter*, 50 Id. 78; *Rodgers v. McCluer's Adm'rs*, 47 Id. 715; and it takes priority over a prior unrecorded mortgage: *Man. & Mech. Bank v. Bank of Pennsylvania*, 42 Id. 240.

UNRECORDED DEED GOOD AS AGAINST EVERYBODY but creditors and purchasers without notice: *Vose v. Morton*, 50 Am. Dec. 750, and cases in note.

SKINNER v. DEMING.

[2 INDIANA, 558.]

NOTES ISSUED BY BANK ORGANIZED UNDER UNCONSTITUTIONAL LAW ARE VOID, and constitute no consideration for a promissory note. *Per Perkins, J.*

JOURNALS OF LEGISLATURE ARE EVIDENCE to show that a bank was not chartered by the requisite vote. *Per Perkins, J.*

JUDGMENT CONTRARY TO EQUITY WILL NOT BE RELIEVED AGAINST BY COURT OF CHANCERY, where a defense existed which might have been set up at law, unless the failure to so set it up was unmixed with fault or negligence on the defendant's part.

IGNORANCE MERELY OF DEFENSE FURNISHES NO EXCUSE FOR EQUITABLE INTERPOSITION by defendant against a judgment at law.

APPEAL. Bill in chancery. The opinion states the case.

J. A. Liston, for the appellants.

J. L. Jernegan, for the appellees.

By Court, PERKINS, J. Bill in chancery in the St. Joseph circuit court, by Deming and Wilson against Skinner, Day, and Sherman. The bill alleges that by section 2 of article 12 of the constitution of Michigan, it is provided that "the legislature shall pass no act of incorporation unless with the assent of two thirds of each house;" that in March, 1837, the legislature of that state did pass a general banking law, without the assent of two thirds of each house; and that in December of the same year said legislature likewise passed an amendment to said general banking law without the assent of two thirds, etc.; that in 1838, under these legislative enactments, and no other, a corporate association was organized, called the "Huron River Bank;" that on the fourteenth of September, 1838, John N. and Monroe C. Sherman borrowed of said pretended Huron River Bank, bills issued by said institution of the nominal value of five hundred dollars, and executed their joint and several notes for the same, at ninety days, and that plaintiff, John J. Deming, executed said note as surety; that afterwards, on the tenth of October, 1840, George N. Skinner, of Michigan, a defendant, as receiver of said pretended bank, recovered a judgment in the St. Joseph circuit court, Indiana, for over three hundred dollars. balance on said note, against plaintiff Deming, and that

plaintiff Wilson became replevin bail upon the same; that said pretended Huron River Bank was an illegal institution, without any authority whatever to issue bills, and that those borrowed, for which said note was given, were utterly worthless and void, and said note, consequently, without consideration; that up to and at the time of the rendition of said judgment and the entry of said bail, the plaintiffs were entirely ignorant of the illegal, unconstitutional passage of the general banking law, and had not even a suspicion of the fact, or of the illegal organization, in any particular, of said pretended bank; that an execution has issued on the judgment, etc. They pray an injunction, a full answer, and general relief.

Skinner answered, admitting the constitutional provision and the general banking law and amendment thereto, of Michigan, but as to whether said law and amendment passed by less than a two-thirds vote he says he "does not know and can not state;" says the Huron River Bank was organized under the original act, before the amendment thereto came into force, and that, in its organization, the provisions of the original act were complied with; does not know whether the act was void or not; admits the note to the bank as stated in the bill, but does not know for what bank bills it was given, as he has no information on the point except what is derived from the bill of complaint, does not know whether Deming is surety; admits the recovery of the judgment, says it was confessed; admits the entry of bail; knows nothing about the want or failure of consideration of the note, but believes the consideration was good; admits the execution; he believes the Shermans have indemnified Wilson for the payment of the judgment, and that a forbearance has been granted to him on his promise to pay. He makes his answer a cross-bill as to these last allegations, and calls for an answer.

This answer of Skinner, so far as it was made a cross-bill, was demurred to, and the demurrer sustained. So far as it was responsive to the bill, it was excepted to for insufficiency; the exceptions were allowed, and on the defendant's refusal to answer further, the bill, so far as it was not sufficiently answered, was taken for confessed; and on the final submission of the cause, a perpetual injunction was granted, restraining the collection of said judgment. Appeal to this court.

If the law of Michigan under which the Huron River Bank was organized was unconstitutional, the bank was an illegal institution; and if it was an illegal institution, the notes issued by it were void, and could constitute no consideration for a

promissory note: See *Green v. Graves*, 1 Doug. (Mich.) 351; *Hurlbut v. Britain*, 2 Id. 191; *Nesmith v. Sheldon*, 7 How. 812; *Leavitt v. Blatchford*, N. Y. Court of Appeals, reported 1 U. S. Law Mag. 116. The defendants to this bill had a right to set up the fact that the bank was not chartered by the requisite vote, and show it, if necessary, by the journals of the Michigan legislature: *Purdy v. People*, 4 Hill, 384. The defendant below, therefore, if he answered at all as to the creation and organization of the bank and the consideration of the note in question, should have answered fully to the best of his knowledge, information, and belief. It would seem, according to *Smith v. Lasher*, 5 Johns. Ch. 247, that, as to the constitutionality of the banking law, he did not in this case answer with sufficient explicitness. This brings us to the point where we may well consider whether the bill makes a case wherein the defendant below was bound to answer at all, and in which the court could grant the relief prayed. It is very manifest that this is an instance in which the judgment at law imposes no hardship upon the defendants to it. The paper borrowed of the Huron River Bank served the purpose of those who obtained it; the security who replevied the judgment was willing to assume that extent of responsibility, and no decision that we can make can enlarge it; while the receiver of the bank, undoubtedly, is attempting to collect together its shattered remains for the benefit, in some way, of the creditors of the concern. That the borrowers succeeded in using the paper of the bank, is evident from the fact that more than two years afterwards they confessed judgment without objection on the note given for it. From all this, it results that this is not a case in which a court should break or bend a rule of law to relieve from said judgment.

A court of chancery will not relieve against a judgment contrary to equity, where a defense existed which might have been set up at law, unless the failure to so set it up was unmixed with fault or negligence on the part of the defendant to such judgment: *Shelmire v. Thompson*, 2 Blackf. 270. In this case the defense existed, and might have been set up at law. Why was it not? The plaintiffs in the bill say they were then ignorant of it. Ignorance, of itself, constitutes no excuse. No diligence had been used to remove the ignorance; and had there been, it might have been removed: See *Shelmire v. Thompson*, *supra*. Besides, when the Shermans went into Michigan to deal with her banks or citizens, they were bound to take notice of the constitution and laws of that state. They then knew,

therefore, that the constitution of Michigan prohibited the creation of any bank otherwise than by a vote of a certain proportion of the members of the legislature, and as prudent men, they should have then looked into the fact, and were bound so to do. But if not then, still more than two years elapsed after the creation of the bank and the borrowing of her bills before the suit at law was prosecuted, in which time this matter might have been looked into. This, we think, is inexcusable negligence. The judgment, being valid against the principals, can not, in this case, be avoided by the replevin bail thereto.

We think this bill makes no case for relief.

The decree is reversed, with costs. Cause remanded, etc.

NOTES ISSUED BY UNAUTHORIZED BANK are not a good consideration for a promissory note: *Wright v. Hughes*, 13 Ind. 111, citing the principal case.

LEGISLATIVE JOURNALS, WHETHER EVIDENCE OF PASSAGE OF STATUTE IN CONSTITUTIONAL FORM: See this question discussed in note to *Jones v. Jones*, 51 Am. Dec. 616. The principal case was cited in *Coleman v. Dobbins*, 8 Ind. 160, as admitting the power of courts to inquire whether a law was passed in conformity to the constitution; and also referred to in *Cordell v. State*, 22 Id. 4, as substantiating a statement that the court had a right to look to legislative journals to ascertain whether an act ever passed both houses; but these dicta were finally overruled in *Evans v. Browne*, 30 Id. 521. See these cases considered in the note to *Jones v. Jones*, *supra*.

EQUITABLE RELIEF AGAINST JUDGMENTS AT LAW, WHEN DEFENSE WAS NOT SET UP.—The rule is well established that a court of equity will not grant relief against a judgment at law when the defendant in the legal action had a good defense, of which he neglected to avail himself: *Le Guen v. Gouverneur*, 1 Am. Dec. 121; *Edwards v. Handley*, 3 Id. 745; *Reeves v. Hogan*, 5 Id. 684; *Clay v. Fry*, 6 Id. 654; *More v. Bagley*, 12 Id. 144; *Donovan v. Finn*, 14 Id. 531; *Brown v. Toell's Adm'r*, 16 Id. 759; *Taylor v. Bradshaw*, 17 Id. 132; *Henderson v. Mitchell*, 21 Id. 526; *Kenner v. Caldwell*, Id. 538; *Norris v. Hume*, Id. 631; *McClure v. Miller*, Id. 522; *Risher v. Roush*, 22 Id. 442; *Armsworthy v. Cheshire*, 24 Id. 273; *Kearney v. Smith*, Id. 550; *Green v. Dodge*, 25 Id. 736; *Haughy v. Strang*, 27 Id. 648; *Collins v. Jones*, 29 Id. 216; *Stroup v. Sullivan*, 46 Id. 389; *Bellamy v. Woodson*, 48 Id. 221; and see in general, when equity will and will not relieve against a judgment at law note to *Oliver v. Pray*, 19 Id. 603. The principal case has been cited to the foregoing proposition in *State Bank v. Campbell*, 12 Ind. 45; *Murphy v. Blair* Id. 186; and see a limitation on the rule as laid down in the last case; and in *Bryant v. Hoskins*, 53 Id. 219, it is cited to the point that a complaint to review a judgment which shows no fraud on the part of the defendant, and no reasonable diligence on the plaintiff's part in defending his rights, but carries gross negligence upon its face, is insufficient. But if the defense be of such a nature that a party may avail himself of it, either at law or in equity, relief may be granted in equity, although the defense might have been made at law: *Clay v. Fry*, 6 Am. Dec. 654; *Hempstead v. Watkins*, 42 Id. 696; and omission to interpose a good defense at law will not prevent the party from availing himself of an independent ground of relief in equity: *Greenlee v. Gaines*, 48 Id. 49. If, however, a party is prevented from making a de-

fense at law through fraud, mistake, accident, or surprise, a court of equity may grant him relief against the judgment: *Turpin v. Turpin*, 3 Id. 615; *Poinlexter v. Waddy*, 8 Id. 749; *Yancey v. Downer*, 15 Id. 35; *Jones v. Commercial Bank*, 35 Id. 419; *Emerson v. Udall*, 37 Id. 604; *Pearce v. Chastain*, 46 Id. 423; and a court of equity will not refuse relief to a party against a judgment on the ground of his not making his defense at law, where the agreement upon which the defense depended was void at law, or where the defense rested upon matters done in the execution of an express trust: *Jones v. Hardesty*, 32 Id. 180.

PRESIDENT AND TRUSTEES OF THE TOWN OF MOUNT VERNON v. DUSOUCHETT.

[2 INDIANA, 586.]

PERSON INJURED BY OBSTRUCTION IN STREET CAN NOT COMPLAIN, but takes the risk upon himself where he knows of such obstruction, and attempts to pass it, but can not see it in consequence of the darkness of night, or of the rise of water over the street.

DECLARATION IN SUIT FOR SPECIAL DAMAGE RECEIVED BY RIDING AGAINST PUBLIC NUISANCE IN STREET must show that there was no fault on the plaintiff's part. It does not follow that because such damage has been received a suit for the injury can be maintained, even against the person who put such nuisance in the street.

ERROR. Action on the case. The opinion states the facts.

J. Pitcher and G. S. Green, for the plaintiffs.

A. P. Hovey, for the defendants.

By Court, BLACKFORD, J. This was an action on the case brought by F. and O. Dusouchett against the president and trustees of Mount Vernon. The declaration contains three counts. To the first count there was a plea of not guilty. The second and third counts were demurred to. The issue on the plea to the first count was tried and found for the defendants; the demurrer to the second count was sustained; and the demurrer to the third count was overruled. The damages were assessed as to the third count, and there was final judgment for the plaintiffs accordingly.

The third count states that on, etc., the defendants, by an act of incorporation, had jurisdiction of the streets of the town of Mount Vernon; that the plaintiffs owned a wharf-boat lying on the Ohio river above low-water mark and below high-water mark, on Store street of said town; that the defendants wrongfully permitted a large construction of iron, called a steam-boiler, to remain in said Store street above low-water mark and below

high-water mark, though the plaintiffs had given them notice to remove the same; that the Ohio river afterwards rose over said boiler and put it out of view, but the defendants put no buoy or mark to denote the place of the boiler; that whilst said boat was on said Store street (the street being covered with water), the river fell with unusual rapidity in the night-time, and the boat, the plaintiffs being ignorant of the location of the boiler, and having taken due care to avoid the same, settled down upon the boiler, and became injured, etc.

We do not think this third count is sustainable. It alleges that the plaintiffs had given the defendants notice to remove the boiler. That is virtually alleging that the plaintiffs knew the situation of the boiler before the rise of the river. It is true that the count also states that the plaintiffs after the rise of the river were ignorant of the location of the boiler, and that they took due care to avoid it. Taking all the allegations together into consideration, and considering also that if there is any incongruity between them, the construction must be taken most strongly against the pleader, the count must be viewed as showing that the plaintiffs had sufficient knowledge of the place of the boiler to enable them to avoid exposing their boat to any danger from it. With that knowledge, the plaintiffs took the boat over that part of the street where the boiler lay, and kept the boat there in the night-time, until, on account of the fall of the water, the boat settled down upon the boiler.

Those facts show that the plaintiffs have no cause of action. If a person knows there is an obstruction in a street, and he attempts to pass the place when, in consequence of the darkness of night, or of the rise of water over the street, he can not see the obstruction, he has no reason to complain of the injury he may receive on the occasion. He takes the risk, in such case, upon himself: *Farnum v. The Town of Concord*, 2 N. H. 392.

It does not follow that, because a person receives a special damage by riding against a public nuisance in a street, he can maintain a suit for the injury, even against the person who put the nuisance there. The declaration in a suit for such damage must show that there was no fault on the plaintiff's part.

We are, therefore, of opinion that the demurrer to the third count should have been sustained.

The judgment is reversed, and the assessment of damages set aside with costs. Cause remanded, with instructions to sustain the demurrer to the third count. Costs here.

CONTRIBUTORY NEGLIGENCE BARS RIGHT OF RECOVERY FOR INJURY: *Munger v. Tonawanda R. R.*, 53 Am. Dec. 384; *Birge v. Gardner*, 50 Id. 261; *Perkins v. Eastern R. R.*, Id. 589; *Tonawanda R. R. v. Munger*, 49 Id. 239; *Irwin v. Sprigg*, 46 Id. 667; *Kennard v. Burton*, 43 Id. 249; *Brown v. Maxwell*, 41 Id. 771; *Johnson v. Whitefield*, 36 Id. 721; *Fleytas v. Ponchartrain R. R.*, Id. 658; *Simpson v. Hand*, Id. 231; *Hartfield v. Roper*, 34 Id. 273, and note collecting prior cases. But knowledge of a defect in a highway by a party injured thereby is not conclusive evidence of negligence contributing to the injury; and evidence that the party knew of the existence of the defect is material only on the point whether he used due diligence in avoiding the injury: *Reed v. Northfield*, 23 Id. 662. The principal case was cited, on the other hand, in *Bruber v. Town of Covington*, 69 Ind. 36, to the point that where a party knows of the existence of an open cellar-way in a sidewalk, and attempts to pass the place in the night, he will be considered as taking the risk upon himself, is guilty of contributory negligence, and can not recover; in *Reist v. City of Goshen*, 42 Id. 342, to the point that the law is well settled, that if the plaintiff or his servant knew of the condition of the bridge when the team and wagon were driven upon it, he can not recover for injuries sustained through its defects; and again, in *Farrelly v. City of Cincinnati*, 2 Disney, 521, it is an authority on the point that if one having access to other routes, voluntarily uses a foundurous way, whereby he is injured, he can not recover. The principal case has also been cited as follows: in *Wayne Co. Turnpike Co. v. Berry*, 5 Ind. 290, to the point that in an action against a turnpike company for injuries received from a fall through its bridge, there being no evidence tending to show that plaintiff knew of the defect in the bridge, when he proved that it was, and had been for a length of time, defective, and that in passing it in the usual course of travel it broke through, causing his injury, he made out a *prima facie* case for recovery, and if in making out that case he did not show his own carelessness, the burden of proof was upon the defendant; in *Mitchell v. Robinson*, 80 Id. 283, to the point that where plaintiff was lawfully and without fault at the place where he was injured by an explosion of defendant's boiler, and the explosion occurred without his fault, this shows that he was free from fault contributing to his injury; and it was quoted from at length and distinguished in *Town of Elkhart v. Ritter*, 66 Id. 144—an action against a town to recover for injuries caused by a fall into an excavation in a public sidewalk—since in the principal case the plaintiff knew of the obstruction, while in the present case the plaintiff had no knowledge of the condition of the sidewalk, and that therefore an instruction asked, embodying the proposition laid down in the principal case, was not law. In *Hanlon v. City of Keokuk*, 7 Iowa, 489, where an action was brought against a city for damages for an injury caused by falling into a cut made in the street, the court held that an instruction that if such cut was known to the plaintiff before the accident, and if he knew the place of his passage was in a dangerous condition, it was his duty to use extraordinary care and vigilance to prevent his falling into the pit, was erroneous, saying: "The case of *The President and Trustees of Mt. Vernon v. Dusouchett*, 2 Ind. 586, hardly commends itself to a just moral sense. It was upon a demurrer to a declaration. This discloses that the plaintiff's vessel was a wharf-boat 'lying on the river,' and not a vessel adapted to or used in navigation. It also states, that in consequence of the river falling with unusual rapidity in the night-time, the boat settled down upon the boiler and became injured. Yet the court say, if a person knows there is an obstruction in the street, and attempts to pass the place, etc., he

has no reason to complain of the injury he receives—he takes the risk upon himself. Now, this is an incorrect view, according to the declaration. The boat was not navigating—it did not attempt to pass; it settled down with the falling water. But suppose it to have been a running vessel, and approaching the town, and the commander knew there was such an obstruction somewhere on the wharf, must he not approach to land? Is he bound to keep off and pass by? So stern a doctrine will hardly answer.”

DECLARATION OR COMPLAINT IN ACTION TO RECOVER DAMAGES FOR INJURY BY NEGLIGENCE in Indiana must aver or show absence of negligence on the part of the plaintiff: *Board of Trustees v. Mayer*, 10 Ind. 401; *Evansville etc. R. R. v. Hiatt*, 17 Id. 105; *Indianapolis etc. R. R. v. Keeley's Adm'r*, 23 Id. 134; *Jeffersonville R. R. v. Hendricks' Adm'r*, 26 Id. 230; *Williams v. Moray*, 74 Id. 27; *Pennsylvania Co. v. Gallentine*, 77 Id. 329; *Jonesboro etc. Turnpike Co. v. Baldwin*, 57 Id. 87; *Louisville etc. R'y v. Boland*, 53 Id. 402, all citing the principal case, which, the court say in the last case, originated the doctrine in that state. In *Morford v. Woodworth*, 7 Id. 83, where a declaration stated that defendant wrongfully left a hole or pit leading to his cellar open and uncovered, into which plaintiff fell while passing in the night, breaking his leg, the principal case was relied upon in support of a demurrer, because it was not alleged that the nuisance was unknown to the plaintiff, but it was distinguished in that the court, in that case, stated the plaintiff's previous knowledge of the obstruction, which the present case did not; the court saying further, that it was properly said in the principal case, that if a person knows of an obstruction in a street, and is injured in attempting to pass in the darkness of the night, he takes the risk upon himself, and can maintain no action for the injury. In *Wood v. Mears*, 12 Id. 523, it was held, citing the principal case, that where an action was brought for injuries caused by driving in the night against dirt and gravel piled by defendant in the street, the answer alleged that the plaintiff, well knowing that the materials were in the street, carelessly drove his mare upon the same, and these facts were admitted by demurrer, the plaintiff could not recover. The principal case was also cited in *Rogers v. Overton*, 87 Id. 411, in holding that the word “fault” has substantially the same meaning as “negligence,” and one who in an action for injuries through negligence avers that he is without fault sufficiently shows that he is free from contributory negligence.

MCKINNEY v. SPRINGER.

[3 INDIANA, 59.]

PLEAS TO COMMON COUNTS FOR WORK AND LABOR ARE IDENTICAL where one is that defendant did not within five years, etc., before the commencement of the suit, promise, etc., and the other, that the causes of action did not accrue within five years, etc., and the latter may be rejected.

PROVISO THAT NEW ACTION MAY BE COMMENCED WITHIN YEAR AFTER REVERSAL, in section 12 of the act of 1838, regulating practice in suits at law in Indiana, if in certain actions judgment be given for plaintiff and afterwards reversed for error, applies to suits in chancery as well as to actions at law; and this, although the reversal be for error for want of jurisdiction.

ACCEPTANCE AND USE OF WORK PERFORMED AND MATERIALS FURNISHED render one answerable on an implied promise to pay for the value he has received to the amount whereby he is benefited, though the work done and materials furnished be not in the manner stipulated in a special contract therefor, and no action can be maintained on the same.

COMPENSATION FOR LABOR AND MATERIALS OF WHICH ANOTHER HAS BENEFIT, equal to the benefit received, may be recovered on an implied contract, irrespective of the question whether the work was finally abandoned at the employer's requirement or not, before its completion.

MODE OF ASCERTAINING REAL BENEFIT RECEIVED FROM PART PERFORMANCE ONLY OF WORK, through the employee's default, is to estimate the whole work at the contract price, and deduct from that the amount necessary to complete the portions of the work left unfinished; and, it seems, special damages sustained through non-performance of the contract may be recouped, or a cross-action brought to recover them.

VALUE OF LOT TO BE CONVEYED IN CONSIDERATION OF BUILDING HOUSE represents the compensation the employee was to receive for the whole work, and from it must be deducted the amount necessary to make up the employee's deficiencies in completing his contract, where the work was abandoned by the latter, but accepted by the employer.

ORIGINAL SPECIAL CONTRACT STILL EXISTS, and is binding on the parties, so far as it can be followed, when they agree to additions and alterations of a building in process of construction under such contract, unless the contract be so entirely abandoned that it is impossible to trace it and say to what part of the work it shall be applied.

INTEREST MAY BE GIVEN FOR VEXATIOUS DELAY OF PAYMENT, under the statute.

STATUTE OF LIMITATIONS DOES NOT BAR ANY ITEMS OF WORK DONE AND MATERIALS FURNISHED in continuation of an entire contract, if some portion of the same was done or furnished within the period of the statute, although other portions may have been done or furnished before that time.

APPEAL from the Decatur circuit court. *Assumpsit*. The opinion states the case.

A. Davison, for the appellant.

J. Robinson and J. S. Scobey, for the appellee.

By Court, SMITH, J. *Assumpsit* by Springer against McKinney for work and labor. The first count alleges that on the sixteenth of May, 1840, the defendant was indebted to the plaintiff two thousand two hundred dollars for building a certain house, and being so indebted, the defendant promised to pay the plaintiff that sum, etc. The second and third counts allege an indebtedness for so much as the building of the said house was reasonably worth.

The defendant filed the following pleas: 1. The general issue. 2. That said causes of action did not accrue within six years. 3. That the defendant did not, at any time within six years,

undertake and promise, in manner and form, etc. 4. That the defendant did not, at any time within five years, undertake, etc. The fifth plea was rejected and is not upon the record. 6. That the revised statutes of 1843 were received by the clerk of the Decatur circuit court on the sixth of March, 1844, and a record was made of such reception; and that the defendant did not, within five years next before said sixth day of March, nor at any time within five years before the commencement of the suit, undertake, etc. 7. The seventh plea is exactly similar to the sixth, except that it alleges the causes of action did not accrue within five years before said sixth day of March, nor within five years before the commencement of the suit.

There are also two pleas of set-off, but as no evidence was given under them, they need not be noticed.

The fourth plea was adjudged bad on demurrer, and the seventh plea was rejected, on the motion of the plaintiff, upon the ground that it is substantially similar to the sixth.

Upon a former trial, a demurrer had been sustained to the sixth plea, and for that reason, the judgment was reversed by this court: See case between same parties, 8 Blackf. 506. The plaintiff, after the cause had been remanded, obtained leave to withdraw the demurrer and file the following replication: That in May, 1840, the plaintiff commenced a suit in chancery for the same causes of action, and obtained a judgment in the circuit court, which judgment was reversed by the supreme court, for error, on the twenty-first of February, 1844, and his bill was dismissed without prejudice; and that said suit in chancery was commenced within five years after the promise, and the present suit was commenced within one year after said decree was reversed.

This replication was demurred to, but the demurrer was overruled; and the plaintiff having taken issue on the first plea, and traversed the other pleas before noticed, the cause was submitted to a jury upon the issues remaining undisposed of, and the plaintiff obtained a verdict and judgment for two thousand two hundred dollars damages.

The first error assigned is, that the rejection of the seventh plea was erroneous. The appellant contends that the sixth and seventh pleas are essentially different, as under the one the statute of limitations would begin to run at the time of the promise, and under the other at the time the cause of action accrued. In the present case, the promises laid in the declaration are all implied, and as no implied promise could arise until the cause of

action accrued, the two pleas must be regarded as identically the same, at least for the purposes of this suit. Whenever there was an indebtedness such as is averred in the declaration, there was a cause of action, and at the same time the promise to pay was implied from the indebtedness. Whether there are any cases in which the statute begins to run before payment is due, we need not now stop to inquire. The general rule is, that the statute does not begin to run at the time of the making of a contract or promise, but from the time the plaintiff might have brought his action, if he was not, at that time, subject to any of the specified disabilities: Chit. Con., 8th Am. ed., 708.

The appellant also contends that the court erred in overruling the demurrer to the replication to the sixth plea. The statute of limitations relied on in that plea is that contained in the twelfth section of the act regulating the practice in suits at law, in the revised code of 1838, page 447. By that section, all actions of debt on simple contract, for rent arrear, actions on the case (other than for slander), actions of account, trespass, trespass *quare clausum fregit*, detinue, and replevin, were required to be commenced within five years, and after enumerating the actions to be commenced within shorter periods, there is a proviso that if, in any of the said actions or suits, judgment be given for the plaintiff and afterwards reversed for error, a new action may be commenced within a year after such reversal. It is urged that this proviso refers to actions at law only, and, it is true, actions or suits in chancery are not expressly named, but we think they are within the spirit and intention of the statute. It is also said that the cause of action relied on in this suit could not have been a proper subject of chancery jurisdiction, and that the actions referred to in the proviso should be interpreted to mean actions whereof the courts in which they were brought had competent jurisdiction. To give it this construction would greatly cripple the effect of the proviso, and would defeat, in a great measure, the object the legislature seems to have had in view, namely, if the plaintiff had made an effort to recover his debt by commencing an action within the limited time, but owing to some error in the mode or form of bringing his suit, or in the proceedings, a proper judgment could not be rendered, and while he was prosecuting such an erroneous action the statute of limitations had run out—to give him sufficient additional time to commence a new suit. In a large majority of the cases where a new suit would be necessary, it would be because of a want of jurisdiction of the first action.

Most other errors would be rectified by new trials. We think, therefore, the meaning of the proviso ought not to be so limited.

Upon the trial the plaintiff, to sustain the issues on his part, proved that he had done certain work in the building of a house for the defendant, and then called several witnesses to prove the value of the work so done according to the customary prices.

The defendant then proved that the work was commenced under a special contract in writing, by which the plaintiff agreed to build a house of the specified dimensions, etc., and to complete the same on the first day of August, 1838; and the defendant in consideration therefor was to convey to the plaintiff a certain house and lot in the town of Greensburgh.

The house was not finished on the day specified, and there was evidence tending to prove that the plaintiff continued to work upon it, with the knowledge of and without objection by the defendant until some time in the year 1839, when the work was abandoned and the defendant took possession of the house, which was still incomplete.

It also appeared that, during the progress of the work, some alterations of the original plan and specifications were made by the agreement of the parties; and there was some evidence that a portion of the work done was defective and not executed in a workman-like manner.

The court gave several instructions to the jury, some of which were to the following effect: That if the work upon the building in question was undertaken by the plaintiff under the written contract given in evidence, and the plaintiff failed to complete the house according to the terms and at the time specified, and the plaintiff abandoned the work while in an unfinished state, without the fault of the defendant, and without his requiring the plaintiff to quit, they should find for the defendant; but if, after the time specified in the contract for its completion, the defendant suffered the plaintiff to proceed with the work, and then before its completion required the plaintiff to quit, the plaintiff should recover the reasonable value of the work done and materials furnished, if the defendant has had the use and benefit of them. That if, after making the written contract, the defendant agreed, by parol, to alterations in the plan of the building, or of the terms of the agreement in any matter, and the plaintiff finished the work according to the alterations or change in the contract, though he could not recover on the

written contract, he could recover the value of the work. That if the jury find for the plaintiff, the measure of damages should be the reasonable value of the work and materials—provided that does not exceed the amount he would have received for the same amount of work if the contract had been finished according to its terms. That if they should find for the plaintiff, and believe from the evidence that payment has been vexatiously and unreasonably delayed by the defendant, they might give interest to the plaintiff for such delay of payment. That if the items of work and materials for which the suit was brought were done and furnished in continuation of one and the same job, and some portion of such labor and materials was done or furnished in July, 1839, or at any other period within six years before the commencement of the suit, they may find for the plaintiff for all the items proved, although some of them may have been done or furnished before that time.

There are several errors in these instructions, which we must proceed to notice. It is a well-established principle, that where one has entered into a special agreement to perform work for another and furnish materials, and work is done and materials furnished, but not in the manner stipulated in the contract, yet, if they are accepted and used by the other party, he is answerable to the amount whereby he is benefited on an implied promise to pay for the value he has received, though no action can be maintained on the special contract. The doctrine is stated in general terms in *Lomax v. Bailey*, 7 Blackf. 603, though that was an action of covenant on the special agreement, and the plaintiff failed. See also *Hollinsead v. Mactier*, 13 Wend. 276; *Van Deusen v. Blum*, 18 Pick, 229 [29 Am. Dec. 582]; *Adams v. Hill*, 16 Me. 215.

In this case, therefore, if the defendant had the benefit of certain labor and materials of the plaintiff, the latter was entitled to recover a compensation equal to the benefit the defendant had so received; and his right to recover did not depend upon the question whether the work was finally abandoned at the requirement of the defendant or not, as is assumed in the instructions.

The plaintiff was clearly in default in not having completed his contract in the time and manner specified, and therefore he does not bring his action on the agreement, but relies on a general count for work and labor. The defendant can not say, in defense, that he rescinded the contract in consequence of the default of the plaintiff, inasmuch as he has received some

benefit from the plaintiff's part performance; and whether the plaintiff finally abandoned the work voluntarily or not is immaterial; but the defendant may show the agreement, to limit the damages; and the value of the work done and materials furnished is to be estimated, in such cases, according to the actual benefit received by the defendant from such part performance, in obtaining the completion of the work stipulated to be done. The plaintiff, having contracted to furnish the work in a finished state, is not entitled to have the value of his services estimated according to the customary prices paid under other circumstances, for that would not be a fair criterion of their value to the defendant.

In the case of *Koon v. Greenman*, 7 Wend. 121, the plaintiff agreed to do certain mason-work in the building of a dwelling-house, the materials to be furnished by the defendant, and the work to be completed by the first of August, 1828, for which the defendant was to pay a stipulated price. The plaintiff commenced the work, but was delayed by the neglect of the defendant to furnish materials, and in the month of October, having performed part of the work, he quit, refused to finish it, and brought suit. On the trial the plaintiff called witnesses to prove the value of the work done, and their evidence was admitted in the court below, but the judgment was, for that reason, reversed; the supreme court holding, that so far as the work was done under a special contract, the prices stipulated in it afforded the best evidence of the value of the work, and that, unless it appear that the work was rendered more expensive to the plaintiff by the improper interference of the defendant, the contract prices were conclusive between the parties.

In *Ladue v. Seymour*, 24 Wend. 60, an action was brought to recover payment for tanning five hundred hides. The work had not been completed within the time specified in a written contract. Bronson, C. J., said the question was not what the work and materials cost the plaintiff, or how much, under other circumstances, he ought to have—he could not be entitled in any event to more than the contract price, and from this must be deducted all the defendant had lost by the want of a strict performance of the agreement.

So, in the case of *Vanderbill v. The Eagle Iron Works*, 25 Wend. 665, it was held that where work to be done in a particular manner was accepted and reduced to use, though it was not done in the manner stipulated, the party for whom it was done was liable in an action for the value, but could claim a reduction for the part left unperformed.

Brewer v. The Inhabitants of Tyringham, 12 Pick. 547, is another case to the same effect. The action was on a *quantum meruit*, for building a bridge. The plaintiff had performed part of the work, pursuant to a contract, and left the rest unfinished. The defendants finished the work, and the plaintiff recovered the price agreed upon, after deducting the expenses incurred by the defendants in completing it.

Mr. Chitty states the measure of damages in such cases to be "the stipulated price, less the sum which it would take to complete the work according to the agreement:" Chit. Con., 8th Am. ed., 493.

In the last clause of the first instruction above quoted, the jury are told that, if the defendant had the benefit of the plaintiff's work and materials, the latter should recover their reasonable value. This instruction, as applied to the circumstances of this case, is erroneous; and the error is not fully remedied by the instruction relative to the measure of damages, which limits such reasonable value to the amount the plaintiff would have received for the same quantity of work, if he had completed his contract. The jury would understand, from these instructions, in applying them to the evidence given, that the "reasonable value" they were to put upon the plaintiff's labor and materials was, not their reasonable value to the defendant under the particular circumstances of the case, but their reasonable value to be estimated according to the customary prices charged by other workmen. By the rule thus given, if a man contracts with another to build a house for a certain price, and leaves the house only half finished, he would be entitled to recover half the stipulated price, when that did not exceed the customary rates, if the owner took possession of the unfinished building, which, in most cases, he could not well avoid doing. It would give the builder a very unfair advantage, for he could stop when he pleased, and compel the owner of the property to pay him a full price for what work he had done, whatever losses might have been sustained by his failure to complete his undertaking. In such cases, the owner of the property contracts to pay a gross sum for a house when complete, not a ratable proportion of that sum for so much of the building as should be erected; and if, through the default of the builder, he obtains only an unfinished house, the proper mode of ascertaining the real benefit received by him from such part performance is to estimate the whole work at the price the parties had agreed upon, and deduct from that the amount nec-

essary to complete the portions of the work left unfinished. If there is any loss occasioned by such unfinished work costing more in proportion than the whole work was undertaken for, such loss is the consequence of the default of the party who originally contracted to do it, and upon him it ought to fall. There may be cases in which the builder would not be entitled to recover so much as the proportion which the work done would bear to the cost of the whole, but he ought not to recover more than that proportion.

It seems that the defendant may, in an action of this kind, reduce the amount to be recovered, by showing that he has sustained special damages by reason of the non-performance of the contract by the plaintiff, or he may waive the recoupment of such damages, and bring a cross-action to recover them: *Epperly v. Bailey*, 3 Ind. 72.

In the present particular case the plaintiff was to be compensated for building the house in question by receiving the conveyance of a lot of ground; but this fact will not occasion any difficulty in the application of the proper measure of damages. If the plaintiff had finished his contract and brought an action on the special agreement, the measure of damages would have been the value of the lot he was to have received, not the reasonable or customary value of the work done: *Ellison v. Dove*, 8 Blackf. 571; *Lucas v. Heaton*, 1 Ind. 264. So, in this suit, the value of the lot must be considered as representing the compensation the plaintiff was to receive for the whole work, and from it must be deducted the amount necessary to make up the plaintiff's deficiencies in the completion of his contract.

The instruction relative to the effect of the alterations in the plan of the building, made by the parties during the progress of the work, is also erroneous. When a building is in process of construction, and additions or alterations are made, the original contract, unless it be so entirely abandoned that it is impossible to trace it and say to what part of the work it shall be applied, is held still to exist, and to be binding on the parties as far as it can be followed. The additions or alterations, if the expense of the work is thereby increased, may be the subjects of a new contract, either express or implied, but they do not affect the original contract, which still remains in force: Ch. on Con. 492; *Lovelock v. King*, 1 Moo. & R. 60; *Wright v. Wright*, 1 Litt. 179; *McCormick v. Connolly*, 2 Bay, 401. In this case the evidence shows that the alterations were not of such a character as materially to interfere with the specifications of the original contract.

The instruction to the jury, that they might give interest for a vexatious delay of payment, is in conformity with a statutory provision, and is not objectionable: R. S., c. 31, sec. 28, p. 581.

The last instruction to be noticed is that having reference to the statute of limitations. So far as it may be understood to mean that the statute would not begin to run until after the plaintiff had ceased to work upon the house in question, this instruction is correct; a contract to build a house, being in law an entire contract to do the thing stipulated, and not a contract for each separate item of work or materials done or furnished in the progress of the undertaking. So far as it favors the idea that the plaintiff is entitled to recover for those items of work and materials what he had proved them to have been worth according to the customary prices paid at the time for similar work and materials, it is, like the other instructions before noticed, erroneous.

The judgment is reversed with costs. Cause remanded, etc.

FAILURE TO COMPLY WITH TERMS OF SPECIAL CONTRACT DESTROYS RIGHT TO RECOVER ON CONTRACT: *Morford v. Martin*, 17 Am. Dec. 168; *Wadleigh v. Town of Sutton*, 23 Id. 704; and see *Coe v. Smith*, 4 Ind. 81, citing the principal case.

RECOVERY FOR WORK AND MATERIALS FURNISHED, when not in the time or manner stipulated in a special contract. The rule is maintained by some cases that an employer is liable on an implied promise to pay for work and labor done and materials furnished by an employee, but not in the manner or time stipulated in a special contract, where the employer has received any benefit; and this, even though the employee be wholly in the fault: See *Hayward v. Leonard*, 19 Am. Dec. 268, and note discussing the question; *Phelps v. Sheldon*, 23 Id. 659; *Britton v. Turner*, 26 Id. 713; *Norris v. School District*, 28 Id. 182; *Merrill v. Ithaca & Owego R. R.*, 30 Id. 130; *Gilman v. Hall*, 34 Id. 700; and see *Eldridge v. Rowe*, 43 Id. 41; and the following Indiana cases which cite the principal case: *Becker v. Hecker*, 9 Ind. 499; *Wheatley v. Miscal*, 5 Id. 143; *McClure v. Secrist*, Id. 32; *Coe v. Smith*, 4 Id. 81; *Cosby v. Adams*, 1 Wil. Sup. Ct. 350; *Adams v. Cosby*, 48 Ind. 155. In the last case the principal case is cited as abrogating the old rule which required a party to a special contract, while it remained executory, to seek his remedy under it, and according to its specific terms, and which denied recovery as to part unless all had been performed. But the employer may reject what has been done and refuse to receive any benefit from the part performance: *Britton v. Turner*, 26 Am. Dec. 713; *McGehee v. Hill*, 29 Id. 277. Where the completion of a special contract has been prevented by the employer, *assumpsit* will lie for the work done: *Blood v. Enos*, 36 Id. 363; *Helm v. Wilson*, 28 Id. 336; but see *Clendennen v. Paulsel*, 25 Id. 435, which holds that covenant and not *assumpsit* is the proper remedy. If a party has been prevented by sickness from the entire performance of a contract of service, he will be entitled to compensation, but the remedy is upon the contract itself, and not upon *quantum meruit*: *Greene v. Linton*, 31 Id. 707. *Assumpsit* may be maintained for the actual value of labor done under a special contract which

has been waived by the parties or substantially performed: *Newman v. McGregor*, 24 Id. 293; *Hunt v. Test*, 42 Id. 659. If the work under the contract was so badly done that no benefit was received from it, *quantum meruit* will not lie: *Taft v. Montague*, 7 Id. 215. Other cases hold that a party who voluntarily abandons work under a special contract before its completion can not recover for what he has done: *Jennings v. Camp*, 7 Id. 367; *McMillan v. Vanderlip*, Id. 299; *Ketchum v. Everton*, Id. 384; *Stark v. Parker*, 13 Id. 425; *Wright v. Turner*, 18 Id. 35; *Roberts v. Beatty*, 21 Id. 410; *Helm v. Wilson*, 28 Id. 336; *Sickels v. Pattison*, Id. 527; and see *Eldridge v. Rowe*, 43 Id. 41. As to the destruction of work before completion, see *Seguin v. Debon*, 5 Id. 735; *Boyle v. Agawam Canal Co.*, 33 Id. 749.

AMOUNT RECOVERABLE WHERE CONTRACT PART PERFORMED: See *Merrill v. Ithaca & Owego R. R.*, 30 Am. Dec. 130; *Blood v. Enos*, 36 Id. 363; *Masterton v. Mayor etc. of Brooklyn*, 42 Id. 38; *Clark v. Mayor etc. of N. Y.*, 53 Id. 379. In estimating the value of the benefit received, the contract price for the service can not be exceeded: *Britton v. Turner*, 26 Id. 713.

DAMAGES SUSTAINED BY EMPLOYER FROM PART PERFORMANCE may be recouped in an action for work done and materials furnished: *Britton v. Turner*, 26 Am. Dec. 713; *Sickels v. Pattison*, 28 Id. 527; *Porter v. Woods*, 39 Id. 153; and the following, in which the principal case was cited: *Barkalow v. Pfeiffer*, 38 Ind. 222; *Hunter v. Leavitt*, 36 Id. 145; *Higgins v. Lee*, 16 Ill. 501.

STATUTE OF LIMITATIONS, RUNNING OF.—The principal case is cited in *Flournoy v. City of Jeffersonville*, 17 Ind. 172, to the point that a mistake as to the form of the remedy is not "negligence in the prosecution" of a suit within the intent of 2 Ind. R. S., sec. 218; and in *Sidener v. Galbraith*, 63 Id. 93, to the point that where an action was brought by a purchaser of land at a sheriff's sale to set aside as fraudulent a previous sheriff's sale, and was determined against the plaintiff on account of a defect in his title, and he subsequently purchased the same land at a third sheriff's sale, and within five years from the determination, but more than six years from the commencement, he commenced a suit against the same defendant and the judgment defendant to set aside the first sheriff's sale and a conveyance made by the judgment defendant to his co-defendant after the commencement but before the determination of the first action, it would be an evasion of the statute of limitations to hold that the second action was a "continuation of the first," within the section above referred to. The principal case was distinguished in *Thompson v. Reed*, 48 Ill. 122, on a claim against an estate on an implied promise to pay for board furnished for a period of seven and one half years, the court holding that any charges for board furnished more than five years previous were barred in the absence of a new promise.

INTEREST RECOVERABLE FOR DETENTION OF DEBT: See *Smith v. Vanderhoest*, 10 Am. Dec. 674; *Selleck v. French*, 6 Id. 185, and note; *Mower v. Kip*, 29 Id. 748.

CITY OF MADISON v. ROSS.

[3 INDIANA, 236.]

MUNICIPAL CORPORATION NOT LIABLE FOR INJURIES TO PRIVATE PROPERTY BY OVERFLOW through the insufficiency of a culvert and embankment, erected by it on a street or road within the corporate limits across a stream, to resist an extraordinary flood not contemplated by ordinarily skillful engineers, and where such improvement had proved sufficient for several years.

DEGREE OF CARE AND FORESIGHT NECESSARY IN ERECTION OF PUBLIC IMPROVEMENTS must be in proportion to the nature and magnitude of the injury likely to result from the occurrence to be anticipated and guarded against, and should be that care and prudence which a discreet and cautious man would or ought to use, if the risk and loss were to be exclusively his own.

ERROR. Case. The opinion states the facts.

S. C. Stevens, for the plaintiff.

J. G. Marshall and J. Sullivan, for the defendant.

By Court, PERKINS, J. Case by Ross against the city of Madison. The declaration alleged that the plaintiff, Ross, was the owner of a tan-yard, and that the city of Madison constructed a culvert and embankment across a small stream of water on Second street, in said city, so unskillfully that, by means thereof, said plaintiff's tan-yard was overflowed and destroyed. The city pleaded the general issue, and a special plea which need not be noticed. The issues were of fact. They were tried by a jury, and Ross obtained judgment. The evidence is not upon the record. The question in the case, for there is but one raised by counsel in this court, arises upon instructions given and refused. The court instructed the jury as follows: "1. The city of Madison is liable for injuries done by her agents, as individuals are. 2. If, in this case, the city, by her council, made an appropriation of fifty dollars, and appointed Marsh and Ford to expend it in the erection of the culvert in question, and it was erected by Dunlap on a contract made by said Marsh and Ford, and paid for by the city, and it was erected negligently, carelessly, or unskillfully, so that it was thereby insufficient to pass off the water, and the plaintiff's tan-yard was overflowed, and he damaged thereby, the city of Madison is liable to said Ross. 3. It is immaterial whether the contracts were made in writing or not, or whether the improvement was made on a street, or on the Lawrenceburgh road, if within the corporate limits of the city. 4. The city of Madison is as much

bound by the acts of Marsh and Ford, if they assumed to act as her agents, and after the acts were done she paid for them, and ratified them, as if she had at first ordered the improvement and made written contracts according to her charter and ordinance. 5. If the jury find from the evidence that, owing to the negligent, careless, or unskillful manner in which the culvert in question was constructed, the tan-yard of the plaintiff was overflowed and he damaged, or the overflow and damage were thereby increased, the jury should find for the plaintiff. 6. If the jury find that the flood of water which the plaintiff says injured his tan-yard would have injured the tan-yard equally as much if said culvert and improvement had not been made, the city is not liable."

The court refused to give this instruction, the same being relevant: "If the jury shall find that the damage complained of was occasioned by a flood of water so much more extraordinary than usual that ordinarily careful and thoughtful men and ordinarily skillful engineers would not contemplate that such a flood would ever come, and said culvert and improvement did prove sufficient for all purposes for about three years, the jury should find the damage to have happened by what, in law, is called the act of God, and should find for the defendant."

The question raised is as to the rule or principle by which the jury were to be governed in determining whether the culvert and embankment were or were not unskillfully constructed. Were they to regard them as unskillfully and negligently made, unless they were such as to withstand every possible force of the element? or should they regard them as skillfully done, if such as to withstand every probable force? On this point the court gave no direct instruction; but the inference to be drawn from those given, taking them altogether, would rather be, that if the damage to the plaintiff happened in consequence of the improvement, the city was liable at all events. The defendant, however, if he asked it, had a right to a definite instruction touching this matter. He did ask one, and if it expressed the law, or was within it, he was entitled to have it given to the jury. We think it was within the law and should have been given. In the *Mayor etc. of New York v. Bailey*, 2 Denio, 433, the chancellor has the following remarks, which are directly to the point, and, we think, entirely correct:

"The degree of care and foresight which it is necessary to use, in cases of this description, must always be in proportion to the nature and magnitude of the injury that will be likely to

result from the occurrence which is to be anticipated and guarded against. And it should be that care and prudence which a discreet and cautious individual would or ought to use if the whole risk and loss were to be his own exclusively. Here the probable, if not the necessary, consequence of the carrying off of the city dam, by a flood, would be not only to sweep away the buildings and erections of all the owners of property upon the Croton below each dam, but also to endanger the lives of such owners and of their families.

“The dam should, therefore, have been constructed in such a manner as to resist such extraordinary floods as might have been reasonably expected occasionally to occur. And if the flood of 1841 was not much higher than any which had been known to occur upon this stream within the memory of man, those who had charge of the construction of the dam should have anticipated such a flood; and should have provided a dam that would have been sufficient to resist the operation of that flood.” “Although the flood of 1841 was not an ordinary one, I think the evidence of the plaintiffs was sufficient to authorize the jury to find that it was one of those occasional floods to which the Croton had sometimes been subject, and which should, therefore, have been provided against by those whose duty it was to guard against the probable consequence of such a flood. C. Flemelling, who lived upon the Croton, within two miles of the city dam, and was born there, testified that he had seen the river higher than in 1841, something more than twenty years previous to that time. He says nothing of the floods of 1837 and of 1839, as he was then in Bedford. But Godney, Marshall, and Thompkins, all of whom lived about two miles above the dam, thought, by the height of the water upon Elbow island, that the same was as high in the flood of 1837 as in that of 1841; and Frost and Bailey, jun., both testified that the floods of 1839 and of 1843 were nearly as great as in 1841. If the evidence given by these witnesses was to be credited, therefore, the flood of 1841 was an occurrence which ordinary care and prudence should have anticipated and guarded against.”

The judgment is reversed, with costs. Cause remanded, etc.

MUNICIPAL CORPORATIONS, WHEN LIABLE FOR INJURIES TO PRIVATE PROPERTY through the making of improvements: See *Ross v. City of Madison*, 48 Am. Dec. 361, where the principal case, as it first came before the court, is reported; *Mears v. Comm'rs of Wilmington*, 49 Id. 412; *Comm'rs of Kensington v. Wood*, Id. 582; *Town Council of Akron v. McComb*, 51 Id. 453; *Rochester White Lead Co. v. Rochester*, 53 Id. 316; *Radcliff v. Mayor etc. of Brooklyn*,

Id. 357, and notes collecting the prior cases. The principal case was cited in *Roll v. City of Indianapolis*, 52 Ind. 559, as laying down the general principles governing the liability of municipal corporations for injuries to private rights; in *Trustees of Wabash and Erie Canal v. Spears*, 16 Id. 443, to the point that the doctrine that an individual may use his own land as he pleases, so that he is reasonably careful that such use shall not injure third persons, is applied to the use of streets by cities, and highways by the state and counties, through their officers; in *City of Evansville v. Decker*, 84 Id. 328, to the point that "against extraordinary and unprecedented freshets, municipal corporations are not bound to provide, but they are bound to make provision, for such as may be reasonably expected to occur, even though their occurrence be at irregular and wide intervals of time. Ordinary diligence requires that the corporate officers should take into consideration the past history of the watercourses, and make reasonable provision for freshets of a similar character to those which have previously occurred, and which were not of an extraordinary character;" and in *Smith v. City Council*, 33 Gratt. 212, to the point that municipal corporations, in making, repairing, grading, leveling, and improving streets, if they exercise reasonable care and skill in the performance of the work, are not answerable to the adjoining owner whose lands are not actually taken, for consequential damages to his premises, unless there is a provision in the charter of the corporation, or in some statute creating the liability.

CASES
IN THE
SUPREME COURT
OF
IOWA.

HALL v. SAVILL.

[3 G. GREENE, 37.]

DEED ABSOLUTE ON FACE MAY BE SHOWN TO HAVE NO GREATER EFFECT THAN MORTGAGE, by records and parol proof; and this may be done as between third persons with notice, as well as between the parties.

DEED GIVEN AS SECURITY IS MORTGAGE, although an absolute conveyance in form.

MORTGAGOR OF LAND IS CONSIDERED THE OWNER, subject only to the lien of the mortgage.

ERROR. Action of right for certain land. The opinion states the case.

J. C. Hall and A. Hall, for the plaintiffs in error.

H. T. Reid and L. R. Reeves, for the defendant.

By Court, GREENE, J. J. C. Hall and W. J. Cochran commenced this action of right against Robert Savill for the north-east quarter of the north-west quarter of section thirty-four, in township sixty-nine north, of range six west, of the fifth principal meridian. Plea, general issue. Verdict and judgment for the defendant.

On the trial the plaintiffs gave in evidence: 1. A register's certificate showing that the land in question was entered March 16, 1840, by Alexander H. Walker. 2. A deed from said Walker dated September 24, 1844, conveying the land to John, Joseph, and Robert Savill. 3. A deed dated November 4, 1844, from Joseph and Robert Savill to William G. Walker. 4. A sheriff's deed conveying said Walker's interest in the land to the plaintiffs. 5. They then gave evidence tending to prove that defendant

was in possession. Also, evidence proving the death of Joseph and John Savill, and that John Savill was the father of Joseph and Robert.

Defendant then introduced the judgment from which the plaintiffs derived their sheriff's deed. The judgment was rendered May 25, 1847, in favor of Michael Sellers against William G. Walker, in which Cochran and Hall were attorneys. The garnishee process issued in said case, with Joseph Savill's answer thereto, was also introduced. The answer shows that Joseph Savill and his brother Robert jointly borrowed of William G. Walker one hundred dollars, for which they were to pay interest at the rate of twenty per cent. per annum, and in order to secure payment they executed the deed to said Walker, and at the same time took a title bond, conditioned that if the Savills should pay to Walker one hundred and twenty dollars in one year, or twenty dollars at the end of one year and one hundred and twenty dollars at the end of two years from date of bond, then Walker was to reconvey the land in question to the Savills. At the date of the answer, April 7, 1846, no part of the money had been paid by the Savills to said Walker.

Defendant then introduced the bill, answer, exhibits, and decree in a chancery case commenced by Joseph and Robert Savill against said W. G. Walker. The bill was filed by one of the plaintiffs, W. J. Cochran as solicitor for the Savills, September 6, 1847, and alleges that the deed made by them to Walker was in the nature of a mortgage, and that they had always been ready to pay according to the stipulations of the bond which was executed on the same day with the deed; that Walker had left the county and had no agent to whom payment could be made; that one of them had been garnished on attachment in the case of *Sellers v. Walker*, and discharged, and that they were both garnished on an execution issued from the judgment in that case; and that they had brought the money into court. The bill prayed for a decree of title to the land. An amended bill was filed May 1, 1848. Bill was confessed to be true and a decree rendered agreeable to the prayer of complainants.

Defendant also gave in evidence a deed from said William G. Walker and wife conveying the land to Joseph and Robert Savill. This deed was dated April 21, 1846, and filed for record April 21, 1848. The plaintiffs objected to the evidence offered by defendant, but the court overruled the objection, and instructed the jury that the evidence submitted did not show any title in the plaintiffs.

The first four errors assigned are to the ruling of the court in admitting the evidences of title introduced by defendant below. This evidence comprises the judgment, the garnishment process, the chancery proceedings, and the deed. This evidence has an important bearing upon the case, and clearly discloses the nature of the transaction between the parties. The records offered are unexceptionable in authentication, were relevant to the issue, and therefore admissible.

The evidence was introduced for the purpose of defeating plaintiff's claim of title by showing that the deed from Joseph and Robert Savill to William G. Walker should have no greater effect than a mortgage; that the plaintiffs had notice of its character before judgment was rendered against Walker, and that they purchased with full knowledge that the deed, though absolute in terms, was in reality a mortgage; that the deed was given by the Savills to secure the payment of money they had borrowed from Walker, who gave a title bond to recover [reconvey] the premises upon the payment of the money within the time stipulated. These facts are clearly established by the records and parol proof. It is conceded that as between the parties to the conveyance it should be treated as a mortgage, but claimed that it can not be so regarded in its application to third persons. This is true, if such third persons are strangers to the contract. Without notice they should not be prejudiced by any private arrangement not expressed in the deed. But in this case the plaintiffs had notice. It appears of record that one of them acted as solicitor for the Savills in the chancery suit to enforce a reconveyance of the land, and both of them acted as attorneys in the suit at law. In these suits the mortgage character of the deed was fully disclosed, and was to the plaintiffs the same as actual notice that the grantee, in form, was nothing more and acquired no greater rights than a mortgagee in fact. With such notice the plaintiffs can not complain that they were misled by the absolute form of the deed. They were as well acquainted with its real character as were the parties themselves. The form then should yield to the substance of the contract, and confer no greater legal benefits upon the plaintiffs than was intended by the parties in the deed, nor greater than could be enforced by the grantee.

In *Walton v. Cronly*, 14 Wend. 63-67, it was decided that even parol evidence was admissible to show that a deed, absolute in its terms, was intended as a mortgage; and that such evidence may be received, not only as between the parties to the instru-

ment, but when third persons are concerned, if they have not been misled by the form of the transaction. It is well settled that parol evidence is admissible to show that an absolute deed was intended as a mortgage: *Habergham v. Vincent*, 2 Ves. 204; *Marks v. Pell*, 1 Johns. Ch. 595; *Dey v. Dunham*, 2 Id. 189; *Strong v. Stewart*, 4 Id. 167; *James v. Johnson*, 6 Id. 417; *Clark v. Henry*, 2 Cow. 324; *Murphy v. Trigg*, 1 T. B. Mon. 73; *Washburn v. Merrills*, 1 Day, 139 [2 Am. Dec. 59]; *Slee v. Manhattan Co.*, 1 Paige, 48, 56, 77; *Gilchrist v. Cunningham*, 8 Wend. 641; *Roach v. Cosine*, 9 Id. 227, 232; *Ring v. Franklin*, 2 Hall, 1, 13; 4 Kent's Com. 142; *Peterson v. Clark*, 15 Johns. 205; *Champlin v. Butler*, 18 Id. 173. Most of these were cases in which the defeasance had been omitted in the deed by fraud or mistake, and in that particular not analogous to the case at bar. But if parol evidence is admissible to establish a mere parol defeasance, the propriety of the record evidence can not be questioned in the present case to show that in connection with the deed there was a bond executed, containing conditions on the performance of which the deed would be defeated, and a reconveyance of the estate secured to the grantor. As between the parties, the bond was executed as a defeasance of the deed, and so as to third persons with actual notice of the transaction.

The object for which a deed is given must be regarded as the true test of its character. If a deed is given as a security, it is a mortgage, although an absolute conveyance in form: *Miami Exporting Co. v. Bank of United States*, Wright, 249; *Den d. Skinner v. Cox*, 4 Dev. 59; *Russell v. Lewis*, 2 Pick. 211; *Peterson v. Clark*, 15 Johns. 205; *Cooper v. Whitney*, 3 Hill (N. Y.), 95; *Clawson v. Eichbaum*, 2 Grant Cas. 132; *Watkins v. Gregory*, 6 Blackf. 113; *Rice v. Rice*, 4 Pick. 349. The fact that the deed in the present case was given as security is conclusively established by the evidence, and was known to the plaintiffs before they purchased. But it is claimed by counsel that the bond as a defeasance to the deed was no better than an unrecorded deed against a judgment creditor, and as a judgment would operate as a lien against such unrecorded deed: *Brown v. Tuthill*, 1 G. Greene, 189; so would a judgment operate against an unrecorded title bond. This position will not be questioned. The principle would prevail against all who had not received actual notice of the bond as a defeasance to the deed. The plaintiffs had such notice, and therefore purchased subject to the defeasance, with the same effect as if they had purchased against a prior unrecorded deed with actual notice.

Again, it is claimed that if Walker should be considered as mortgagee, he still had a "conditional fee" on interest in the land which could be sold. Doubtless the amount due from the Savills to Walker might have been secured by proper process, to apply on the judgment against Walker, but obviously that could not be done by selling land owned by the Savills on an execution against Walker. The mortgagor of land has generally been considered the owner, subject only to the lien of the mortgagee: *Walton v. Cronly*, 14 Wend. 63-66, and cases cited. The rights and interest of the mortgagor do not pass to the mortgagee until he acquires possession. The mortgage before entry and foreclosure is deemed a pledge or charge upon the land, and subject to that lien the legal rights and remedies of others may be asserted and enforced in the same manner as if no such mortgage existed: *Willington v. Gale*, 7 Mass. 138; *Taylor v. Porter*, Id. 355; *Goodwin v. Richardson*, 11 Id. 469, 473; *Eaton v. Whiting*, 3 Pick. 484; *Blanchard v. Brooks*, 12 Id. 47; *Fay v. Cheney*, 14 Id. 399; *Collins v. Torry*, 7 Johns. 278 [5 Am. Dec. 273].

We conclude then that the court below did not err in admitting the evidence offered by defendant in this case; nor in charging the jury that the evidence did not show title in the plaintiffs.

Judgment affirmed.

DEED ABSOLUTE ON FACE MAY BE SHOWN BY PAROL TO BE MORTGAGE: *Moore v. Madden*, 46 Am. Dec. 298; *Nichols v. Reynolds*, 36 Id. 238; *Swart v. Service*, 34 Id. 211, and prior cases in note.

MORTGAGOR, WHERE REGARDED AS OWNER, AND MORTGAGE MERE SECURITY: *Waring v. Smyth*, 47 Am. Dec. 299, and note collecting prior cases.

HUNER v. DOOLITTLE.

[3 G. GREENE, 76.]

AUTHORITY TO CONFESS DECREE UNDER POWER OF ATTORNEY NOT EXHAUSTED by a confession when the decree was reversed; and a second confession may be made under the power.

INTEREST HOW CALCULATED IN CASE OF PARTIAL PAYMENTS.—When the payment exceeds the interest due, calculate interest on the principal up to the date of payment, add this interest to the principal, and then deduct the payment. If the payment falls short of the interest due, calculate the interest on the principal up to the time when the payments will overrun the interest due on the principal, and then deduct the payment.

ERROR. The opinion states the case.

J. C. Hall and D. Rorer, for the appellant.

H. W. Starr, for the appellee.

By Court, GREENE, J. In this case a decree of foreclosure was confessed in the court below, on a power of attorney. A decree had been confessed in the same case at a previous term of the court. It is therefore contended that the first act of confession exhausted the authority of the attorney to confess under that power. This would be true if the first decree had been valid or remained unreversed. But it appears that it was taken to the supreme court and reversed. This placed the case and the rights of the parties the same as if the first decree had not been rendered. The intention of the power had not been carried out, consequently the object was not accomplished, and the authority was not exhausted by the first act.

The second objection urged to the decree below is in relation to the computation of interest. The payments indorsed on the mortgage were applied to satisfy the interest due, and not to the principal. It is contended that the payments should have been applied to the principal exclusively.

In this state no particular rule has been adopted for calculating interest, where partial payments have been made. But the rule established by the supreme court of New York, in 1824, has been generally sanctioned in other states, and was followed in calculating interest in the present case. As the rule is fair and simple, we think it should prevail in our state. We have therefore concluded to adopt this practice.

When the payment exceeds the interest due, calculate interest on principal up to the date of payment, add this interest to the principal, and then deduct the payment.

If the payment falls short of the interest due, calculate the interest on the principal up to the time when the payments will overrun the interest due on the principal debt, and then deduct payment; so as to avoid taking interest upon interest: *Williams v. Houghtaling*, 3 Cow. 86.

Judgment affirmed.

POWER OF ATTORNEY TO CONFESS JUDGMENT IS REVOCABLE at pleasure of the principal, unless it is supported by a consideration, or is held as security, or is necessary to effectuate a security: *Evans v. Fearne*, 50 Am. Dec. 197; and as to revocation of powers of attorney in general, see note to *Brookshire v. Brookshire*, 47 Id. 343.

INTEREST IN CASE OF PARTIAL PAYMENTS, HOW COMPUTED: *Hart v. Dorman*, 50 Am. Dec. 285, and note discussing the question fully. The rule as laid down in the principal case was followed in *Smith v. Coopers*, 9 Iowa, 387.

JOHNSON v. WILLIAMS.

[3 G. GREENE, 97.]

HUSBAND IS LIABLE ONLY FOR WIFE'S NECESSARIES in the absence of an express or implied promise on his part to pay her debts.

SERVICES RENDERED IN PROCURING DIVORCE FOR WIFE ARE NOT NECESSARIES, and the husband is not liable for them as such.

ERROR. The opinion states the case.

J. Matthews, for the plaintiff in error.

George C. Dixon, for the defendant.

By Court, KINNEY, J. Suit brought by Johnson to recover six hundred dollars, which he alleged to be due for professional services as the attorney and solicitor of Sarah Williams, the wife of the defendant.

By the bill of particulars filed, it appears that the services were rendered in a suit brought by the wife for divorce.

On the trial the plaintiff's counsel prayed the court to give the following instruction: "That a husband is by law liable on an implied promise to pay lawyers, and officers of the court, for their reasonable charges and fees, for services rendered to the wife in prosecuting her right to divorce and alimony, upon the ground of necessities;" which instruction the court refused; but instructed the jury that the defendant was not liable for professional services rendered to the wife of defendant in procuring a divorce and alimony, if such divorce and alimony are obtained, unless he was employed by defendant, either in person or agent, or unless defendant promised to pay, or unless he was ordered to pay for such services by the court. The refusal to give the instruction asked, and the instruction given by the court, are assigned for error.

We think the court ruled correctly. Without an express or implied promise on the part of the husband to pay the debts of the wife, he is only bound for necessities. In law the term "necessaries" is understood to mean not only articles which are of absolute necessity, but also such things as are suitable to the fortune and condition of the person to whom they are supplied: *Seaton v. Benedict*, 5 Bing. 28; Story on Con., sec. 98, p. 102. Are the expenses incurred in carrying on a lawsuit for a divorce necessities, according to the technical legal meaning of that word? After a careful examination of the elementary works and reports upon the subject of the liability of the husband for the debts of his wife, we have not been able to find

an author or an adjudged case that regards the expenses of such suit in the light of necessities. It has been the custom of courts after granting the wife a divorce to decree an allowance in favor of her attorney. This in some states is regulated by statute, in others by uninterrupted custom, but we find no case where the husband has been sued and a recovery had upon the ground of necessities. The wife did not bind the husband as his agent, for it is a well-settled rule, that the wife can only bind the husband by her contract as his agent acting under his authority or with his concurrence, express or implied: Story on Con., sec. 96, p. 100. The husband—the defendant—then was not liable as for necessities, nor upon the authority of the wife to employ counsel as his agent, without proof that she had such authority, or that he concurred in her acts in that particular.

Judgment affirmed.

HUSBAND'S LIABILITY FOR WIFE'S NECESSARIES: See *Baker v. Barney*, 5 Am. Dec. 328; *McCutchen v. McGahay*, 6 Id. 373; *Hanover v. Turner*, 7 Id. 203; *Cunningham v. Irwin*, 10 Id. 458, and note; *Walker v. Simpson*, 42 Id. 216. A husband is not liable for debts of his wife contracted after she has obtained a decree against him for alimony: *Bennett v. O'Fallon*, 22 Id. 440; and as to his liability for money loaned the wife with which necessities have been purchased, see *Walker v. Simpson*, *supra*. A son-in-law is not liable for the maintenance of his wife's parents: *Mack v. Parsons*, 1 Id. 17; *Commissioners v. Gansett*, 23 Id. 139.

WIFE'S POWER TO BIND HUSBAND BY CONTRACTS: See *Mackinley v. McGregor*, 31 Am. Dec. 522; *Benjamin v. Benjamin*, 39 Id. 384; *Casteel v. Casteel*, 44 Id. 763.

HUSBAND'S LIABILITY FOR LEGAL SERVICES IN WIFE'S BEHALF, IN PROSECUTING OR DEFENDING DIVORCE.—A husband is not liable to his wife's attorney for services rendered in prosecuting or resisting a petition for divorce: *Wing v. Hurlburt*, 40 Am. Dec. 695; and see note to *Cunningham v. Irwin*, 10 Id. 463. The principal case is cited in *Dow v. Eyster*, 79 Ill. 256, to the point that an action at law against a husband can not be maintained by a solicitor who may prosecute or defend an action of divorce for his wife.

GARRETSON v. VANLOON.

[3 G. GREENE, 128.]

TIME IN CONTRACT NOT ESSENTIAL, IN GENERAL, in equity, where circumstances of a reasonable nature have prevented a party from strict compliance in that particular.

TIME IN CONTRACT MAY BE MADE MATERIAL either by express agreement or by the peculiar nature and conditions of the contract.

FACTS AVERRED IN ANSWER AND SWORN TO ARE CONCLUSIVE upon all points responsive to the bill, where the bill is not supported by affidavit or proof.

INTENTIONS OF PARTIES AS REGARDS TIME OF PERFORMANCE WILL BE SECURED in equity as at law, and when time appears to be a distinct or essential feature in the contract, it should be considered material and be enforced.

SPECIFIC PERFORMANCE WILL BE REFUSED WHERE THERE IS NO AVERMENT OF PERFORMANCE, or offer to perform.

APPEAL. Bill for specific performance. The opinion states the case.

J. C. Hall and C. Mason, for the appellant.

H. W. Starr, for the appellee.

By Court, GREENE, J. Bill for specific performance filed in the district court of Henry county by Joseph Ferguson against John Vanloon. Previous to trial, the death of Ferguson was suggested, and Garretson as administrator substituted. Venue changed to Des Moines county.

The bill alleges that on the fifth day of April, 1841, Vanloon sold to Ferguson the east half of south-east quarter of section twenty-seven in township seventy north, of range six west, containing eighty acres; and executed a title bond conditioned in substance that if Ferguson should pay his promissory note given for the purchase money, amounting to one hundred and twenty-six dollars and fifty cents, on or before the fifth of October, 1841, thereupon Vanloon should execute to him a good and sufficient warranty deed for the land. The bill also states that complainant made valuable improvements upon the land; that defendant extended the time of payment specified in the bond until April 4, 1842; that the true consideration was one hundred and six dollars, instead of one hundred and twenty-six dollars and fifty cents as mentioned in the bond, the surplus twenty dollars being intended as penalty; that October 28, 1841, he turned out a horse to Vanloon worth fifty dollars or more, the price of which was to be credited on the bond, and avers a readiness to pay the balance of the purchase money. The bill appears to have been filed May 12, 1842. The allegations therein are not supported by affidavit.

The answer of Vanloon denies the allegation in the bill, that the true consideration was to be one hundred and six dollars, instead of one hundred and twenty-six dollars and fifty cents, and alleges that there was no other contract than that set forth in the bond; that the said sum of one hundred and twenty-six dollars and fifty cents was the price agreed to be paid by said Ferguson, and that by mutual agreement time was made mate-

rial in said contract; that on the said fifth day of October, 1841, Ferguson utterly failed to pay any portion of said consideration money; but that October 28, 1841, he went to him and offered to waive all forfeiture resulting from his failure to pay at the time stipulated, and that he would then convey the land to Ferguson if he would pay the amount agreed upon in the bond; but Ferguson professed an inability to pay at that time, and thereupon proposed conditions to extend the time of payment until April 4, 1842, by indorsement on the bond, and then and there turned out a horse in part payment, with the understanding that the price should be twenty-five dollars, to be indorsed upon the bond, with the extension of payment; that the horse was sold to him at the low price of twenty-five dollars as an inducement to extend the time of payment without interest; that said Ferguson has wholly failed to pay any other portion of said consideration money, and denies that he ever tendered or professed a willingness to pay the amount due, and also denied that any improvement of value was made upon the land. The answer is properly sworn to, and no portion of it disproved by any exhibit or deposition. In this condition the cause was submitted to the court, and the bill dismissed.

The principal objection urged to this decision is founded upon the hypothesis that time was not made a material point of the contract. This assumption is mainly derived from the rule that courts of equity do not regard time as essential, in a contract where circumstances of a reasonable nature have prevented a party from strict compliance in that particular. But this rule is by no means universal. Time may be made material either by express agreement or by the peculiar nature and conditions of the contract. If to any substantial degree it becomes material to the rights and interest of the parties, or if expressly stipulated, time then becomes an important ingredient, and would now be generally regarded by courts as of the essence of the contract: *Lloyd v. Collett*, 4 Bro. C. C. 469; *Harrington v. Wheeler*, 4 Ves. 686; *Omerod v. Hardman*, 5 Id. 722; *Guest v. Homfray*, Id. 818; *Alley v. Deschamps*, 13 Id. 225; *Garnett v. Macon*, 2 Brock. 185; *Taylor v. Longworth*, 14 Pet. 173; *Wells v. Smith*, 2 Edw. 78; *Hatch v. Cobb*, 4 Johns. Ch. 559; *Wells v. Smith*, 7 Paige, 22 [31 Am. Dec. 274]; *More v. Smedburgh*, 8 Id. 601; *Jackson v. Ligon*, 3 Leigh, 161; *Scott v. Fields*, 7 Ohio, 424.

In this case it appears to have been uniformly the intention of the parties to make time an essential part of the contract. The bond explicitly requires Ferguson to pay his promissory note of

one hundred and twenty-six dollars and fifty cents by the fifth day of October, 1841, and if paid on or before that time, the said Vanloon shall thereupon make a good and sufficient warranty deed for the land. The subsequent conduct of the parties shows the interpretation they placed upon this language. It should be observed, that the bill is not supported either by affidavit or proof, and therefore the facts averred in the answer and sworn to are to be taken as conclusive upon all points responsive to the bill.

It appears then that Ferguson regarded the conditions of the bond as having been forfeited, and in order to obtain a renewal of them till April 4, 1842, he sold Vanloon a horse for less than his value. The application to have the bond renewed proves conclusively that Ferguson regarded time as an important element in the contract. The time of payment in such contracts frequently has a controlling influence. A party is often induced to sell valuable property at a price considerably less than its real value, in order to obtain the money upon a particular day to meet some engagement, or secure some object of immediate importance, and which might be entirely frustrated if the payment should not be made as stipulated in the contract. A failure of payment at the time agreed upon, under many circumstances, would defeat the very object which induced the sale, and therefore the contracting party could not be placed in the situation he would have occupied if the contract had been performed. In such cases, the theory that interest is a fair equivalent for non-payment at the agreed time falls far short of the reality. The daily experience of business life proves that such disappointments can not be compensated by any established rule of interest. We think, therefore, that reason and justice call loudly upon courts of equity, as well as courts of law, to secure the intentions of parties in such cases. When the time of performance appears to be a distinct or essential feature in the contract, it should be considered material, and be enforced.

But there are other reasons in this case which fully justified the court below in dismissing the bill. There is nothing to show that the complainant at any time performed his part of the contract, or placed himself in a position to demand a specific performance. The answer shows that Ferguson not only failed to pay the money on the fourth of April, 1842, but also that he never tendered nor offered to tender the money after that time.

A court of equity will not grant a specific performance of a contract to a party until he has done his duty, and having

called upon the other party to perform meets with a refusal. Had the money been tendered, it is probable that the deed would have been made, and the cost and trouble of the suit avoided, or had the money been tendered and the deed refused, there would have been some ground for equity jurisprudence. As the party has not placed himself in a position for equitable interposition, he must be left to his remedy at law.

The decree appealed from is therefore affirmed with costs.

Decree affirmed.

TIME WHEN ESSENCE OF CONTRACT.—In equity time is not, in general, considered of the essence of a contract: *Tyree v. Williams*, 6 Am. Dec. 663; *Bellas v. Hays*, 9 Id. 385; *Craig v. Martin*, 19 Id. 157; *Andrews v. Sullivan*, 43 Id. 53; *Jones v. Robbins*, 50 Id. 593, and note; but time may be made of the essence of a contract by intention or stipulation: *Benedict v. Lynch*, 7 Id. 484; *Wells v. Smith*, 31 Id. 274; *Rogers v. Saunders*, 33 Id. 635; *Jones v. Robbins*, 50 Id. 593, and note; *Prince v. Griffin*, 27 Iowa, 519, citing the principal case.

AVERMENT OF PERFORMANCE OR OFFER TO PERFORM necessary in bill for specific performance: *Chess' Appeal*, 45 Am. Dec. 668; and a party can not ask for specific performance unless he has performed or offered to perform on his part: *Laverty v. Hall's Adm'x*, 19 Iowa, 529, citing the principal case; and see *Wells v. Smith*, 31 Am. Dec. 274; *Lewis v. Woods*, 34 Id. 110, and cases in notes thereto; *Hoen v. Simmons*, 52 Id. 291.

GALLINGER v. POMEROY.

[3 G. GREENE, 178.]

AGREEMENT TO PAY SUM OUT OF NOTE WHEN COLLECTED IS EQUITABLE ASSIGNMENT of such sum, which can not be claimed as assets of the estate of the insolvent holder of the note.

APPEAL. Bill in equity. The opinion states the case.

W. H. Brumfield and W. A. Thompson, for the appellant.

George G. Wright, for the appellee.

By Court, GREENE, J. Bill filed by Abram B. Gallinger against John Pomeroy, administrator of the estate of David M. C. Lane. The facts stated in the bill show that Lane, on the twenty-fourth of February, 1849, executed a written instrument in these words: "On or before the first day of April next, I promise to pay Elam Rush fifty-five dollars for value received, to be paid out of a note I hold on W. H. Barnes when collected, sooner or later, using due diligence." On the twenty-seventh of June following, Rush assigned this instrument to complainant. Be-

fore the Barnes note was collected Lane died insolvent; Pomeroy was thereupon appointed administrator of the estate, and soon after collected the note against Barnes, and refused to pay the fifty-five dollars to complainant from the funds collected, but claimed the same as assets for the estate. Complainant thereupon filed his bill to enforce payment, agreeable to the tenor of said instrument, out of the funds realized from the Barnes note. A decree was rendered in favor of complainant for the amount of the instrument, but ordered payment from the assets of the estate, thus placing it in the situation of other demands against the estate, to draw *pro rata* from the assets. To that portion of the decree complainant objects, and now seeks to reverse in this court.

We think the instrument executed by Lane clearly expresses the intentions of the parties, and that it was designed as an equitable transfer of fifty-five dollars of the funds which might be realized from the Barnes note. In equity Lane assigned his interest to that portion of the note, and held the same in trust for Rush or his assignee; complainant, as assignee of Rush, acquired an equitable lien upon fifty-five dollars of the note and of the funds when collected. The funds paid on the note came into the hands of the administrator of Lane, clothed with the trust and subject to the equitable lien which had been created by the parties to the instrument in question. The administrator then had no right to consider the fifty-five dollars as general assets of the estate.

The authorities upon this point we regard as conclusive: Story's Eq. Jur., secs. 1043-1045. In *Estate of Ferran*, 1 Ashm. 319, it was held that when an intestate had given his creditor an order on his debtor, which was accepted, payable out of funds when they should come to hand, that it gave the creditor a specified lien on the fund out of which it was to be paid, and that it could not be considered as assets in the hands of administrator, on the death of the intestate. The same principle obtained in *Merrick's Estate*, 8 Watts & S. 402. In deciding the case at bar, the court below must have considered the instrument as possessing nothing more than the properties of a promissory note, with the usual liability against the maker. But we regard it as an assignment of fifty-five dollars of the Barnes note, and an undertaking to use due diligence in collecting and paying the same to Rush, and it clearly indicates that the credit was given upon the faith of that particular fund, rather than upon the individual responsibility of Lane.

The decree of the court below is therefore reversed, and a decree will be rendered in this court agreeable to the prayer of complainant's bill.

Decree reversed.

ASSIGNMENT OF PART OF DEMAND.—A part of a note can not be transferred so as to give a right to sue for such part; but if a party has an interest in a note, it will be protected by a court of chancery: *Scott v. Searles*, 45 Am. Dec. 317. As to whether a part of a debt or fund may be assigned, see *Gibson v. Cooke*, 32 Id. 194; *Palmer v. Merrill*, 52 Id. 782. An assignee of the interest of a joint payee of a negotiable note acquires by the assignment no right of action at law in his own name: *Miller v. Bledsoe*, 32 Id. 37.

SWAFFORD v. WHIPPLE.

[3 G. GREENE, 261.]

PLEAS INAPPLICABLE OR INSUFFICIENT may be stricken out, or demurrers to them sustained, without error.

OBJECTION TO REJECTION OF PLEAS IS WAIVED by going to trial on those remaining, and taking no exceptions to the ruling of the court below.

MEASURE OF DAMAGES FOR BREACH OF COVENANT OF SEISIN is the consideration money paid and interest thereon.

ONUS PROBANDI LIES UPON PARTY who seeks to support his action or defense by a particular fact of which he is supposed to be cognizant.

ONUS PROBANDI LIES UPON DEFENDANT in action for breach of covenant of seisin, where he pleads that he was lawfully seised of the premises.

CONSIDERATION IN DEED MAY BE EXPLAINED, CONTROLLED, OR REBUTTED BY PAROL, where the amount paid becomes a material inquiry; as for the purpose of ascertaining the measure of damages for breach of a covenant of seisin.

ERROR. Covenant. The opinion states the case.

C. Bates and J. D. Templin, for the plaintiff in error.

William Smyth and I. M. Preston, for the defendant.

By Court, GREENE, J. Covenant by Whipple against Swafford, on a breach of warranty in a deed. The declaration states that the defendant, on the fourteenth of February, 1842, in consideration of two hundred and fifty dollars, conveyed and sold to the plaintiff a tract of land in Mercer county, Illinois, and that the plaintiff covenanted by the deed that he was lawfully seised in fee of the premises. The second count also sets out a covenant of seisin. Each count assigns the breach that the defendant was not seised in fee. By the record it appears that the defendant first filed a plea of performance of covenants, and after objection thereto by demurrer, filed five pleas: 1. Perform-

ance of all the covenants in the deed. 2. That he was lawfully seised of the premises. 3. That at the date of the deed he was seised of an indefeasible estate in fee simple. 4. Deed executed without a good consideration. 5. Deed obtained by fraud and circumvention. A motion to strike out the fourth and fifth pleas was sustained. On demurrer to the first three pleas, the court held the first to be insufficient, and that the second and third were good. At a subsequent term the defendant filed four additional pleas, which were numbered as the fourth, fifth, sixth, and seventh pleas. A demurrer was sustained to all these pleas but the fourth, which averred that the deed was obtained by fraud and circumvention; thus leaving the second, third, and fourth pleas upon which issue was joined. The cause was submitted to a jury, who returned a verdict for the plaintiff.

To the proceedings in this case, seven errors are assigned. The first four relate to the pleadings. To the ruling of court in striking out the fourth and fifth pleas, and in sustaining the demurrers to the other pleas, we see no objection, as those pleas were either inapplicable or insufficient. Besides, the record does not show that the defendant objected to the decision in relation to them. By going to trial and resting his defense upon the three remaining pleas, and taking no exceptions to the ruling of the court in rejecting the other pleas, it must be presumed that the objection was waived. Had the party relied upon those pleas as material to his defense, he should have excepted below, and should have had the matter presented to this court by bill of exceptions: *Cook v. Steuben Co. Bank*, 1 G. Greene, 463; *Eddy v. Wilson*, Id. 259. The same rule prevails in other states. In *Bowyer v. Hewitt*, 2 Gratt. 193, when no exception had been taken to opinion of the court rejecting a special plea offered by the defendant, it was held that the appellate court could not inquire into the correctness of that opinion. So in *Pelham v. Page*, 6 Ark. 535, where pleas were stricken out by the court below and not brought upon record by bill of exceptions, it was held that they could not in any manner be regarded in the supreme court.

The fifth error alleged is, that the court instructed the jury that if they believed the plaintiff ought to recover, the measure of damages which they ought to assess in favor of said plaintiff is the amount of consideration money and interest on the same from the date of the deed, at the rate of six per cent. per annum.

We consider the objections urged to this instruction without

foundation. It does not necessarily limit the consideration money to the amount mentioned in the deed. It extends to the consideration money actually paid and the legal interest thereon, agreeable to the wise, just, and moderate rule of common law which has been adopted in most of the states of this Union. In Massachusetts, it is true, a different rule was adopted in the first settlement of the country, and still obtains. There the measure of damages is the value of the land at the time of eviction. But in other states the measure is the value of the land or the consideration paid at the execution of the deed. In *Staats v. Ten Eyck*, 3 Cai. 111 [2 Am. Dec. 254], it was decided that the damages for breach of a covenant of warranty are the amount paid, interest, costs of eviction, and of the suit brought on the covenant: See also *Pitcher v. Livingston*, 4 Johns. 1 [4 Am. Dec. 229]; *Bennet v. Jenkins*, 13 Id. 50; *Baldwin v. Munn*, 2 Wend. 399 [20 Am. Dec. 627]; *Sheets v. Andrews*, 2 Blackf. 274; *Backus v. McCoy*, 3 Ohio, 221 [17 Am. Dec. 585]; *Rutledge v. Lawrence*, 1 A. K. Marsh. 396; *Lowe v. McDonald*, 3 Id. 354; *Tapley v. Lebeaume*, 1 Mo. 550; *Martin v. Long*, 3 Id. 391; *Stubbs v. Page*, 2 Greenl. 378; *Bender v. Fromberger*, 4 Dall. 441; *Wilson v. Forbes*, 2 Dev. L. 30; *Pearson v. Davis*, 1 McMull. L. 37; *Elliott v. Thompson*, 4 Humph. 99 [40 Am. Dec. 630]; *Morris v. Rowan*, 2 Harr. (N. J.) 304; *Logan v. Moulder*, 1 Ark. 313 [33 Am. Dec. 338]; *Catchcart v. Bowman*, 5 Pa. St. 317; *Davis v. Smith*, 5 Ga. 274 [48 Am. Dec. 279]. In *Sterling v. Peet*, 14 Conn. 245, it was held that in an action on a covenant of seisin the damages are the consideration money and interest thereon; but upon a covenant of warranty, the value of the land at the time of eviction. Chancellor Kent says: "The buyer, on the covenant of seisin, recovers back the consideration money and interest, and no more:" 4 Kent's Com. 475. Under these authorities, the correctness of the instruction, as a proposition of law, can not be questioned.

The next point raised is, that the court erred in deciding that upon the issue joined, the burden of proof lay upon the defendant that he held the affirmative, and must first introduce evidence to sustain the issue, and that plaintiff was not bound to prove that the defendant had not kept his covenants as stated in the declaration.

It is a well-settled rule of evidence that the party who alleges shall prove the affirmative of any proposition. Ordinarily the issue lies upon the plaintiff, and the *onus probandi* is on him to establish what he affirms. But it frequently happens in making

up an issue, the defendant assumes the affirmative proposition, or confesses and seeks to avoid the action, and would fail if no evidence in avoidance should be adduced by him. In such event, the proof is incumbent on the defendant as the party who would fail, if no evidence should be given on either side, or as the party who has thrown a negative proposition on the plaintiff, which might be difficult, and perhaps impossible for him to prove, and in relation to which the defendant has all the evidence in his possession. Hence it is laid down that the *onus probandi* lies upon the party who seeks to support his action or defense by a particular fact of which he is supposed to be cognizant. Thus, when a party pleads infancy or a license, he must prove it. So if the defendant plead freehold in himself in an action of trespass *quare clausum fregit*: 1 Stark. Ev. 418-423.

In *Ayer v. Austin*, 6 Pick. 225, the same rule is recognized as applicable to all cases, when by the pleadings nothing essential to the action is required of the plaintiff, and when the finding for the defendant depends upon affirmative proof from him.

Abbott v. Allen, 14 Johns. 248, was an action where the defendant covenanted that he had good title, and the court held that as a grantor is not bound to deliver to his grantee his evidences of title, the legal presumption is that he retains and can produce them; that the plaintiff holds the negative merely, and is not bound to aver or prove an outstanding title until the defendant disposes his title; and that it is only incumbent on the plaintiff to negate the title of the defendant, who pleads affirmatively that he had good title.

In the present case there was but a single point in controversy before the jury. The defendant pleaded that he was lawfully seised of the premises. Upon this question he assumed the affirmative; it was for his interest to prove it, as it would operate a complete bar to the action. The nature of the title to the premises may have rendered it extremely difficult, or even impossible for the plaintiff to prove the negative averment, as the only evidence in relation to the title may have been exclusively under the control of the defendant. If he had title at the time the deed declared on was executed, he could easily have shown it; and if he had no title, the covenant was broken, regardless of any third person who may have had the title. We conclude, then, that the court did not err in deciding that the *onus probandi* lay upon the defendant.

The only remaining point to be considered is, did the court err in rejecting evidence offered by defendant to show what the

real consideration was, and that it was for other and different consideration from that expressed in the deed?

The general rule is supported by all the authorities, that in a court of law, where the consideration money is expressed in a deed for the purpose of conveying land, the law will permit no averment to the contrary. This rule is applicable to all cases where the object is to defeat the conveyance on other grounds than that of fraud; but not in cases where the amount actually paid as consideration money becomes a material inquiry, and is the measure of damages to be assessed. It is by no means uncommon for a grantor to acknowledge one consideration in a deed, and receive a much less or entirely different consideration in satisfaction. For that reason the rule now generally prevails in American courts, that the clause in a deed acknowledging a sum of money as consideration for the transfer is open to explanation by parol proof. It is held that as a receipt for money may be explained by parol, so in that respect may a receipt of money expressed in a deed: *Shephard v. Little*, 14 Johns. 210. And in *Bowen v. Bell*, 20 Id. 339 [11 Am. Dec. 286], it was held that the general rule as to the inadmissibility of parol proof to vary a written contract, or show a different consideration from that expressed in the deed, is not applicable to a case where the payment or the amount of the consideration becomes a material inquiry.

In *McCrea v. Purmort*, 16 Wend. 460 [30 Am. Dec. 103], parol evidence was held admissible to show that the consideration was iron at a stipulated price, instead of money. The following cases also show the admissibility of parol proof to explain the consideration expressed in deeds: *Morse v. Shattuck*, 4 N. H. 229 [17 Am. Dec. 419]; *Pritchard v. Brown*, Id. 400 [17 Am. Dec. 431]; *Harvey v. Alexander*, 1 Rand. 219 [10 Am. Dec. 519]; *Steele v. Worthington*, 2 Ohio, 182-187; *Hutchinson v. Sinclair*, 7 T. B. Mon. 291-293; *Gully v. Grubbs*, 1 J. J. Marsh. 388; *Beldon v. Seymour*, 8 Conn. 304 [21 Am. Dec. 661]; *Schillinger v. McCann*, 6 Greenl. 364; *O'Neale v. Lodge*, 3 Har. & M. 433 [1 Am. Dec. 377]; *Weigley v. Weir*, 7 Serg. & R. 309; *Wilkinson v. Scott*, 17 Mass. 249; *Mead v. Steger*, 5 Port. 498; *Saunders v. Hendrix*, 5 Ala. 224; *Tisdale v. Harris*, 20 Pick. 9. A very recent case in New York contains the same doctrine. In an action like the one at bar, upon a covenant of seisin, it was held that the true consideration, and that only part of it had been paid, might be shown by parol for the purpose of ascertaining the measure of damages, although the deed expressed a different consideration,

and acknowledged that the whole of it had been paid; and that therefore there is no necessity for resorting to equity for relief in such a case: *Bingham v. Weiderwax*, 1 N. Y. 509. Under these authorities it must be conceded that the rule is well established in this country that the clause in a deed acknowledging payment of the consideration money is merely *prima facie* evidence of the fact, and may be explained, controlled, or rebutted by parol evidence; and is only conclusive to estop the grantor from alleging that the deed was executed without consideration. Upon this point, then, the ruling of the court below was erroneous, and the judgment must be reversed.

Judgment reversed.

MEASURE OF DAMAGES FOR BREACH OF COVENANT OF SEISIN is the consideration money and interest: *Spring v. Chase*, 39 Am. Dec. 595, and prior cases in note; *Rich v. Johnson*, 52 Id. 144.

ONUS PROBANDI LIES UPON DEFENDANT IN ACTION FOR BREACH OF COVENANT OF SEISIN: See *Logan v. Moulder*, 33 Am. Dec. 338. The principal case was cited to this proposition in *Schofield v. Iowa Homestead Co.*, 32 Iowa, 321; *Jerald v. Elly*, 51 Id. 323; and in *Ingalls v. Eaton*, 25 Mich. 34, as following the case of *Marston v. Hobbs*, 2 Mass. 433; S. C., 3 Am. Dec. 61, holding that the defendant, when sued for a breach of covenant of seisin, has the affirmative of the issue, and is required to take upon himself the burden of proof to establish his seisin.

CONSIDERATION IN DEED EXPLAINED, CONTROLLED, ETC., BY PAROL.—To ascertain the damages for the breach of a covenant of seisin in a deed, the true consideration may be shown by parol, notwithstanding a different consideration is expressed: *Morse v. Shattuck*, 17 Am. Dec. 419; *Belden v. Seymour*, 21 Id. 661; and as to explaining, controlling, etc., recitals of consideration in general, see *Bolton v. Johns*, 47 Id. 404; *Burrage's Lessee v. Beardsley*, Id. 382; *Banks v. Brown*, 30 Id. 380; *Union Canal Co. v. Young*, Id. 213; *McCrea v. Purmort*, Id. 103, and prior cases in note. The principal case was cited in *Aufrecht v. Northrup*, 20 Iowa, 63, to the point that the consideration named in a deed does not preclude a party from showing what the real consideration was.

BARTON v. FAHERTY.

[3 G. GREENE, 327.]

WARRANTY OF TITLE IS IMPLIED IN SALE OF CHATTEL by one having possession and selling as his own, and a promise to refund the money paid is implied if the seller has no title.

PRICE PAID FOR STOLEN CHATTEL MAY BE RECOVERED FROM THIEF, in *assumpsit*, although the thief has not been tried for the felony.

ERROR. *Assumpsit*. The facts are stated in the opinion.

T. S. Wilson and P. Smith, for the plaintiff in error.

T. Davis and F. E. Bissell, for the defendant.

By Court, GREENE, J. This was an action of *assumpsit* commenced by John Faherty against Isaac Barton, to recover back the purchase money of a stolen horse. By an agreement before this court, it is admitted that the plaintiff in the court below proved that Barton sold him the horse in June, 1849, and that soon after the horse was taken from Faherty by one Rose, from whom he was proved to have been stolen; that Faherty paid Barton sixty-five dollars for the horse, and that, although Barton stole the horse, he had not been convicted or acquitted of such stealing. Under this state of facts, it was decided by the court below that the plaintiff might recover the value of the horse in this action. It is now claimed that the decision below is erroneous, that the plaintiff could not recover until the defendant had been tried for the felony; and that *assumpsit* will not lie, even if the plaintiff could recover in the proper action. In support of this position it is assumed that a felony can not be made the foundation of a civil action. But is a felony made the foundation of this action? It appears that Barton sold Faherty a horse to which he had no title. In every sale of chattels, where the seller has possession of the articles, and he sells as his own and not as agent for another, the law implies a warranty of title: Com. on Con. 145; 3 Bla. Com. 165; 2 Kent's Com. 478; *Defreeze v. Trumper*, 1 Johns. 274 [3 Am. Dec. 329]. The law is equally well settled that the purchaser may have a satisfaction from the seller if the title proves deficient.

In this case, when Barton received the money a promise was implied in law that if he gave Faherty a horse to which he had no title that he would refund the money. It appears that Barton had no title to the horse, and that the true owner established his right to the horse and took him from Faherty; hence Faherty could recover the purchase money in *assumpsit* on Barton's implied promise. This civil action then is not founded upon a felony, but upon a transaction in which the defendant received money from the plaintiff for a horse to which the defendant had no title. The action is not commenced for the value of the horse by the owner against a thief, but it is by a third party, to recover money which had been received from him without consideration.

But under the statute of this state, R. S. 175, sec. 48, a person losing property by larceny, robbery, or burglary may maintain his action against the felon or against any person in whose possession the same may be found. May not a third person,

then, with much greater propriety, bring suit against the felon, not for stealing the horse, but for having received from him money for a horse to which the felon had no title? This action can not be regarded as merged in the felony because it is not founded upon the felonious act, but upon a subsequent and separate transaction. Hence the English authorities cited by counsel are not applicable to this case. But the doctrine is not recognized in England to the extent claimed by counsel; it is merely regarded by the English judges as against the policy of the law to permit a party who has suffered by the crime of another to seek his remedy in a civil action, because he would be the less ready to bring the offender to justice. But this policy is not recognized by the laws of Iowa. We can find no American authority that would prohibit a party from his remedy by civil action, for an injury occasioned by the crime of another: *Boardman v. Gore*, 15 Mass. 331. Where the felony is punishable with death, there is some reason why the felon should not be sued in a civil action until after acquittal or pardon, for if convicted he might be executed, and on the principle that all felonies include a trespass, the action would die with him. But we think no good reason can be suggested why an injured party may not have an action for his damages where the wrongdoer is living.

We conclude, then, that the court below correctly decided that the plaintiff might recover the value of the horse in this action.

Judgment affirmed.

IMPLIED WARRANTY OF TITLE ON SALE OF CHATTELS: See *Defreeze v. Trumper*, 3 Am. Dec. 329; *Chism v. Woods*, Id. 740; *Boyd v. Anderson*, Id. 762; *Forsythe v. Ellis*, 20 Id. 218; *Perley v. Balch*, 34 Id. 56; *Lile v. Hopkins*, 51 Id. 115; and a warranty of title is broken immediately if the vendor has no title, and the statute of limitations begins to run from the time of the sale: *Chancellor v. Wiggins*, 39 Id. 499; but there is no implied warranty of title on the sale of land: *Dorsey v. Jackman*, 7 Id. 611.

TITLE TO CHATTELS PURCHASED FROM THIEF: See note to *Williams v. Merle*, 25 Am. Dec. 606.

THIEF WHETHER LIABLE IN CIVIL ACTION BY OWNER OF STOLEN CHATTEL: *Foster v. Tucker*, 14 Am. Dec. 243, and note to *Williams v. Merle*, 25 Id. 606.

THE PRINCIPAL CASE IS CITED in *Brandt v. Foster*, 5 Iowa, 292, to the point that in a suit brought for the price of a chattel the purchaser may take advantage of a breach of warranty, either as to its quality or title, as a defense, and either as evidence of failure of consideration or in mitigation of damages.

BUSH v. SULLIVAN.

[3 G. GREENE, 344.]

PAROL LICENSE TO WORK MINERAL LAND ON SHARES IS IRREVOCABLE, where the licensee has been induced to make expensive improvements under the license, without giving him six months' notice to quit, or refunding the amount expended.

PAROL LICENSE TO WORK MINERAL LAND NOT IP SO FACTO VOID under statute of frauds, where improvements have been made on its faith, but it may be declared void by a competent tribunal on terms calculated to prevent fraud.

ERROR. Ejectment. The facts are stated in the opinion.

L. A. Thomas, for the plaintiff in error.

P. and J. M. Smith, for the defendants.

By Court, GREENE, J. Action of ejectment by J. D. Bush against M. J. and J. M. Sullivan. Plea, general issue. Verdict and judgment for defendants.

We learn from the facts recited in the bill of exceptions that defendants had been in possession of plaintiff's mineral land, by virtue of an unlimited parol license, for about two years; that they had made large expenditures in proving the ground; that under the arrangement plaintiff was to have one fourth of the mineral raised by the defendants, as his ground rent, and that he had already received proceeds of his fourth of eight thousand two hundred and forty pounds. It also appears that defendants owned lands adjoining the *locus in quo*, that one of the objects in sinking shafts and running drifts was to get upon and prove their own land, and that in February, 1850, the parties met and agreed upon the terms of a written lease to the mining interest; that a lease was signed by the parties but not delivered; that plaintiff then read a lease which he wanted defendants to sign, by which they were to furnish him certain pasture ground at one dollar a year, but defendants object to give the pasture privilege for more than one year, therefore plaintiff declined delivering the lease which he had signed, and forbid defendants from going on or mining upon the ground from that time forth. But they continued mining on the ground from that time till in August with the knowledge of, but without further objection from plaintiff. Upon these facts the court instructed the jury that plaintiff forbidding defendants further working or mining the ground at the time they attempted to execute a written lease was not sufficient notice to quit.

Although defendants were in possession under parol permission only, still as that possession was authorized by the owner of the soil, and as under that license they had been induced to make expensive improvements, it would be repugnant to the leading objects of the law to recognize a notice that would give neither remuneration for the improvements nor time to make them available. True, a parol lease, like the present, is at least voidable under our statute of frauds, and at all times revocable by the owner of the land; still there are principles of law and common honesty that should be observed in such revocation. Where these parol arrangements to work mineral lands on shares are of such common occurrence, and when a statute of frauds renders them so inoperative, it becomes highly important that some principles should be recognized by the courts under which gross injustice may be avoided.

If a miner has been induced, under parol license, to sink a shaft or run drifts, and if before proving the ground the license is revoked, he should have either the six months' notice recognized at common law to a tenant at will, or else the amount expended by him on the ground should be refunded. These well-known principles should no doubt be recognized in cases like the present. In England it has been held that a parol license to work and improve lands, where an expense has been incurred, can not be revoked without repaying the expenses: *Winter v. Brockwell*, 8 East, 308, note 1. This important principle may well be recognized in a parol license like the present, which comes within the statute of frauds. Before declaring such an agreement void under the statute, a court should apply every appropriate principle of law to bring the parties *in statu quo*. And hence, we assume that the license in the present case was not absolutely void, as claimed by counsel, under the third section of the statute of frauds; it is only voidable. Not *ipso facto* void, but may be declared void by a competent tribunal on terms calculated to prevent fraud. If the owner of the soil desires to revoke such parol license, he should refund the expenses incurred in improvements or give such reasonable notice as would enable the occupant to secure the products contemplated for his labor and improvements.

The doctrine is well settled that a parol tenancy for farming purposes is to be considered a tenancy at will from year to year, and that six months' notice to quit is necessary. The reason for this principle is that the tenant should have time to reap the crop which he had planted. Upon the same principle a parol license

to sink shafts and run drifts for a share of the mineral found and raised, there is the same reason and necessity for the rule, that the miner shall have like notice to enable him to prove the range and raise the mineral which his money and industry have developed. In such a case at least six months' notice should be given, or compensation for the improvements should be made.

We see nothing in *Banbridge on Mines*, or in any other authority cited, that militates against this principle. We conclude, therefore, that the court below correctly charged that the notice to quit was not sufficient.

Judgment affirmed.

REVOCABILITY AND VALIDITY OF PAROL LICENSES: See *Hamilton v. Putnam*, *ante*, 158, and the prior cases collected in the note thereto. In *Beatty v. Gregory*, 17 Iowa, 114, the court said, with reference to the principal case, that "while some of the observations *arguendo* in that case may admit of question, the decision itself, under the facts, was just and proper;" and in *Harkness v. Burton*, 39 Id. 104, it was held, citing the principal case, and *Beatty v. Gregory*, *supra*, that "under the well-settled doctrines of this court, a parol license of mining lands is valid, and can only be terminated by compensation to the licensee, or the notice necessary to terminate a tenancy at will."

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

HAMILTON v. SUMMERS.

[12 B. MONROE, 11.]

NOTE EXECUTED IN FIRM NAME BY ONE MEMBER THEREOF is *prima facie* obligatory upon the firm, and it is incumbent upon a party denying the firm's liability to prove that it was not executed for the benefit of the firm or in its business.

FACT THAT PAYEE OF NOTE GIVEN BY ONE PARTNER IN FIRM NAME believed that the borrowed money for which it was given was to be applied to an individual purpose will not prevent the note from binding the firm, if the money borrowed was actually used for a partnership purpose.

PARTY OBJECTING TO COMPETENCY OF WITNESS must prove the existence of the interest which he claims to render the witness incompetent.

ADMISSIONS OF SURVIVING PARTNER, DIRECT OR INDIRECT, ARE EVIDENCE against him in a suit against him, although the judgment would not affect the question of contribution between him and the representatives of the deceased partner.

ADMISSIONS OF ONE PARTNER, MADE AFTER DISSOLUTION of the partnership, are not evidence against the other partner.

IT IS NOT ERROR TO ADMIT EVIDENCE WHICH MAY BE MADE COMPETENT by the introduction of subsequent testimony.

DEBT. Error to the Montgomery circuit. The opinion states the case.

Hamilton and French, for the plaintiff.

Haslerigg, for the defendant.

By Court, MARSHALL, J. This action of debt was brought by Summers against Hamilton, as surviving partner of the firm of Hamilton & Sandford, upon a note for four hundred dollars,

to sink shafts and run drifts for a share of the mineral found and raised, there is the same reason and necessity for the rule, that the miner shall have like notice to enable him to prove the range and raise the mineral which his money and industry have developed. In such a case at least six months' notice should be given, or compensation for the improvements should be made.

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Judgment affirmed.

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DEBT. Error to the Montgomery circuit. The opinion states the case.

Hamilton and French, for the plaintiff.

Hazlerigg, for the defendant.

By Court, MARSHALL, J. This action of debt was brought by Summers against Hamilton, as surviving partner of the firm of Hamilton & Sandford, upon a note for four hundred dollars,

executed by Sandford in the partnership name, dated the twenty-seventh of April, 1848, and payable one day after date to Summers. Hamilton pleaded *non est factum*. And the case, upon the evidence, turned upon the question whether the note was executed for the benefit of the firm, in a partnership transaction, or for the private debt of Sandford to Summers, or for a loan to Sandford for his individual use, and known by Summers to be for that use.

The note itself, executed in the firm name by one of the firm, was, *prima facie*, obligatory upon both partners, and after proof of its having been so executed, it devolved upon the defendant to show to the satisfaction of the jury, that it was executed for the individual debt of Sandford, or loaned to him for his private purposes, and not for the benefit of the firm or in its business, and that Summers knew or had reason to know that this was the case. The first instruction given by the court on motion of the defendant conforms substantially to the principle just stated. But the second goes further, and is more favorable to the defendant than it should have been, in declaring that if Summers at the time Sandford borrowed the money and executed the note believed it was borrowed for the purpose of paying off the private debts of Sandford or of his wife, the law was for the defendant. The belief of Summers, that the money was borrowed for such individual purpose, though it might prove an intention on his part to do an unjust act, would have no effect in law, unless the fact corresponded with his belief. And even if the money was avowedly borrowed for a private purpose, with the knowledge of Summers, still, if it was in fact used for the purpose of the firm, we are not prepared to say that the note executed in the firm name should not be binding upon all the partners.

Under the instructions referred to, none having been given for the plaintiff, the jury found against the plea of *non est factum*. And the defendant's motion for a new trial having been overruled, a judgment was rendered against him, for the reversal of which he prosecutes a writ of error. The only questions reserved on the trial relate to the competency of witnesses, the admission and rejection of evidence, and the exclusion or refusal to exclude evidence. These questions we shall proceed very briefly to notice.

1. Several of the plaintiff's witnesses stated that they, or in some instances their wives, were legatees of Sandford; and they were objected to as incompetent on this ground. But the will

was not produced, nor was the nature or amount of these legacies stated either by the witnesses objected to or any others, nor was there any proof showing that their legacies would be affected by the termination of this suit one way or the other. If it were conceded that the result of this suit would determine whether the estate of Sandford is liable for the whole or for only one half of this note, still it is not shown that these legatees, or any of them, would receive more or less in either result, nor in fact is it shown that their legacies are not paid, or that if paid, there is any probability that they must be refunded to meet any part of this demand. And whatever might be the case in this respect, we suppose the judgment in the present case would not be evidence between Hamilton and the executors of Sandford, either to preclude or establish the liability of one to the other, or to determine its extent.

It can not be assumed, therefore, upon the mere fact that these witnesses are legatees of the deceased partner, that they have any certain interest in the result of the suit, or in the record as evidence. And as the party making the objection should sustain it by proving such interest, and has failed to do so, there was no error in allowing the witnesses to testify.

2. The defendant proved by two witnesses, conversations between himself and the plaintiff, relating to the note sued on, and in which the defendant denied his liability to pay it, and said it was not for a partnership debt, which was not contradicted by Summers. These conversations were excluded by the court on motion of the plaintiff, on the ground that they had occurred in the absence of Sandford, who was then, in fact, dead. But it was not against Sandford, but against Summers, the plaintiff, that the evidence was offered. And it was not the statement of Hamilton in his own favor that constituted the evidence, but the answer of Summers, or his failure to answer, from which it was the province of the jury to draw the appropriate inference according to their own judgment. The jury might have considered the evidence as sufficient to establish an indirect admission of the fact asserted by Hamilton. And as in this suit between Summers and Hamilton, a direct admission of the same fact by the former would unquestionably be evidence against him, so is his indirect admission. A judgment for the defendant founded upon the direct admission of Summers would have precisely the same effect upon the liability of Sandford's estate as one founded upon the indirect admission. But such a judgment would not in either case affect the question of

contribution between Hamilton and Sandford's executors, should they be compelled to pay the whole debt. We are of opinion, therefore, that the court erred in excluding this evidence, but there was no error in rejecting the statements of Sandford in the absence of Summers.

3. The plaintiff proved by two witnesses, statements made by Sandford on his death-bed, in the absence of both Hamilton and Summers, to the effect, that he had sold out his interest in the firm to Hamilton, who was to pay the firm debts, and that all notes in the firm's name were for firm debts, except one which was designated, and was not the one now in question. Without noticing other objections, it is sufficient to say that this statement upon its face was made after a dissolution of the firm. And in the case of *Daniel v. Nelson*, 10 B. Mon. 318, this court, upon full consideration of the question, and in accordance with its previous decisions, decided that the admissions of one partner after dissolution are not evidence against the other. We are of opinion, therefore, that this evidence was inadmissible, and should have been excluded on the motion of the defendant for that purpose.

4. The plaintiff read in evidence three letters in the handwriting of Sandford signed in the name of the firm, addressed to B. F. Thomas & Co., at Maysville, all dated and postmarked at Sharpsburg, the town in which the firm had a store, and each purporting to inclose a particular sum of money (proved by the postmaster to have been inclosed in it), and directing payment of a note of the firm payable in bank. The first of these letters bears date on the same day on which the note sued on is dated, and the others on the second and fifth days thereafter.

The object of this evidence was, as is presumed, to authorize the inference that the money for which the note in suit was executed was appropriated to the payment of a firm debt. But it is not proved that any money was advanced by Summers at the date of the note, or that a loan from him was necessary for the purposes of the firm, or that the firm actually owed any such debt at bank as that referred to in the letters, or that the money inclosed was applied to the payment of any debt actually due by it, except so far as these facts or some of them may be established by the note and the letters themselves, or may be inferred from the failure of the defendant to produce, upon notice, the cash-book of the firm. The presumption necessarily arises that the persons from or through whom the plaintiff obtained posses-

sion of the letters could have proved or explained the facts referred to in them; but it is not even proved that there was any such firm as that addressed, except by the letters themselves. In the absence of all explanatory and auxiliary evidence, we should greatly doubt whether the mere coincidence between the dates of these letters and the note sued on would furnish any rational ground of inferring that the money for which the note was given was applied to partnership purposes. But even if it did not, there was no error in admitting the letters when offered, because other evidence might have been offered in corroboration of them; and we can not say that the defendant's failure to produce the cash-book does not furnish some corroboration and afford a ground of inference against him. But there was no motion to exclude the evidence.

The objections taken by Summers to the time and manner of perfecting the bill of exceptions are sufficiently met by the consent order of the previous term.

And for the errors which have been noticed, the judgment is reversed, and the cause remanded for a new trial in conformity with this opinion.

PARTNER CAN BIND COPARTNER BY NOTE IN NAME OF FIRM, WHEN: See *Crozier v. Kirker*, 51 Am. Dec. 724, note 728, where other cases are collected.

ORDER IN WHICH TESTIMONY IS INTRODUCED IS IN DISCRETION OF COURT: See *Rogers v. Brent*, 50 Am. Dec. 422, note 435; *Commonwealth v. Eastman*, 48 Id. 596, note 609, where other cases are collected.

ACKNOWLEDGMENT OF DEBT BY PARTNER AFTER DISSOLUTION OF FIRM: See *Ellicott v. Nichols*, 48 Am. Dec. 546, note 557, where other cases are collected.

DECLARATIONS OF PARTY AS TO PARTNERSHIP when admissible as against himself: *McCorkle v. Doby*, 47 Am. Dec. 560; *Dixon v. Hood*, 38 Id. 461; *Grafton Bank v. Moore*, Id. 478.

PROOF OF INTEREST DISQUALIFYING WITNESS: See *Jones v. Tevis*, 14 Am. Dec. 98; *Irish v. Smith*, 11 Id. 648.

RENO ET AL. v. HOGAN.

[12 B. MONROE, 63.]

COMMON CARRIER CAN NOT BY SPECIAL AGREEMENT EXEMPT HIMSELF from liability for losses occasioned by the gross negligence of himself or of his servants.

ERROR to the Louisville chancery court. The opinion states the case.

Guthrie, for the plaintiff.

Speed, for the defendant.

By Court, SIMPSON, C. J. The only question in this case is, Can the owners of a steamboat, by inserting in the bill of lading that the boat is not to be accountable for breakage of the contents of boxes received by them as freight, so limit and restrict their undertaking as common carriers, that they will be discharged from all liability, although an injury to the contents of the boxes may have been produced by gross negligence upon their part?

A common carrier can relieve himself by a special contract from his liability as an insurer, and may, on receiving goods as freight, insist on special and qualified terms, by which his responsibility is to be limited. Still, however, the doctrine is well settled, that common carriers can not by any special agreement exempt themselves from all responsibility so as to evade the salutary policy of the law. They can not exempt themselves from liability for losses or injuries occasioned by the gross negligence of themselves or their servants: Story on Bail., 365. The boxes received in this case by the boat contained looking-glass plates of considerable value. Their contents were made known to the officers of the boat, and they were so marked as to indicate that it was necessary to their safety that great care in handling them should be observed. The testimony proves most satisfactorily that they were delivered to the boat at New Orleans in good order, the contents uninjured, and the glass packed with great care.

It further appears that when they were delivered at Louisville, all the glass in one of the boxes was broken into small fragments. The testimony leaves no room for rational doubt that the box received during the time it was in the possession of the boat a violent concussion, which occasioned the total loss of its contents. An indentation upon the outside of the box, the fact that the plates of glass were of considerable thickness and not easily broken, and the additional fact that boxes containing glass were turned over and over by the hands on the boat, as if they were boxes of dry goods, all tend to produce that conclusion. Besides, the officers of the boat have failed to prove that the loss was the result of an unavoidable casualty, or to manifest the manner in which it actually occurred. It seems to us, therefore, that it must have been the consequence of gross negligence.

Although the responsibility of the owners of the boat, as common carriers, was restricted and modified by the terms of the

bill of lading, yet the provision that they were not to be accountable for breakage does not have the legal effect of exempting them from such injuries as arose from gross negligence; and therefore the decree of the chancellor, which requires them to compensate the owner of the glass for the loss he sustained, is consistent with the principles governing the law of the case.

Wherefore the decree is affirmed.

COMMON CARRIER CAN NOT EXEMPT HIMSELF FROM LIABILITY FOR NEGLIGENCE: See *Sager v. Portsmouth, S. & P. & E. R. R. Co.*, 50 Am. Dec. 659; *Swindler v. Hilliard*, 45 Id. 732; *Cole v. Goodwin*, 32 Id. 470, note 498 et seq., where this subject is discussed at length.

BERRY v. HAMILTON.

[12 B. MONROE, 191.]

MORAL FITNESS OF PERSON APPOINTED EXECUTOR BY WILL can not be inquired into by the court to which he applies for permission to qualify. EXECUTOR DERIVES HIS OFFICE FROM TESTAMENTARY APPOINTMENT, and if he is a person not disqualified by law from being an executor, the court has no right to refuse to permit him to qualify or to refuse to grant him letters testamentary.

MOTION. Error to the Bath county court. The opinion states the case.

Robinson and Johnson, for the plaintiff.

Apperson, Hamilton, and French, for the defendants.

By Court, CRENSHAW, J. John Berry, executor of the last will and testament of Eliza Ann Hamilton, moved the county court of Bath county to permit him to give bond and security and be qualified as such executor. The court overruled his motion, and he has brought the case to this court.

Many witnesses were introduced, and a large volume of evidence was given upon the trial of this motion—all, in regard to the moral character and the moral fitness of said Berry to be executor of said will. Much of this testimony involved particular transactions of Berry in a fiduciary and individual capacity, but we deem it altogether unnecessary to enter into an investigation of it, or to mention any impression which it has made upon our minds, either pro or con. It is sufficient for us to say, that the law has declared who may and who may not be executors, and if Berry be a man whom the law allows to be appointed as such, it follows that, upon his motion to give bond and security, and

to qualify under the will, it was the duty of the county court, if the security was sufficient, to permit him to give bond and be qualified as executor and to grant to him letters testamentary.

If the opinions of men in regard to the moral characters of those who may be appointed executors, and in whom testators repose confidence, whatever those opinions may be, are to be received, and are to constitute the evidence by which, in law, we are to ascertain who may and who may not be appointed executors, we apprehend that but few appointments would fail to be contested by some of the relatives of testators, who are often too easy to be dissatisfied, or by persons who themselves desire to be administrators for personal aggrandizement, or who would rejoice in so fit an opportunity to gratify some private hatred. Such inquiries would involve questions of very difficult and doubtful decision—such as, how good a man must be to qualify him for executor, and how bad he must be to disqualify him—how could any certain rule of determination be established? Inquiries of such a nature would be the most vague and uncertain in their results of any ever instituted in a court of justice; and would, in our opinion, be absurd in the extreme.

Besides, to allow an inquisition of the sort would be to deny to men a privilege which for centuries has been held to be most sacred and dear—that of freely disposing of their own property to whom they please, and of appointing trustees of their own choice to manage and control it when they are no more. Whatever may be the opinions of men as to the propriety or impropriety of a particular appointment, the very basis and foundation of the exercise of the right which society has granted to its members to appoint their own representatives after death, is the special confidence reposed by the testator in the appointee. And men, it seems to us, would care but little for the high privilege of disposing of their estates to their own liking, if they are to be denied the right of selecting those who are to carry out and effectuate the benevolent purpose of their wills.

It is true some persons are incapable of being executors—the law has pointed out who they are, and society has long been satisfied with the wisdom of the rules upon this subject.

In Williams on Executors, vol. 1, page 118, it is said: “There are few or none who, by our law, are disabled on account of their crimes from being executors; and therefore it has always been held that persons attainted or outlawed may sue as executors, because they sue *in autre droit*, and for the benefit of the

parties deceased." The same author says, page 121, that "idiots and lunatics are incapable of being executors or administrators; for these disabilities render them not only incapable of executing the trust reposed in them, but also by their insanity and want of understanding they are incapable of determining whether they will take upon them the trust or not." Whether an alien enemy can be an executor appears not to be fully settled.

The author whom we are quoting, on page 112, lays down the doctrine that, "generally speaking, all persons who are capable of making wills, and some others beside, are capable of being made executors;" and says, that "from the earliest time it has been a rule that every person may be an executor, saving such as are expressly forbidden." It is said, moreover, by this same author, on page 119, "that the spiritual court can not refuse to grant the probate of a will to a person appointed executor on account of his poverty or insolvency."

The doctrine of the law as thus laid down by Williams will be found to comport with the other standard authors upon the same subject; and it is found that Berry comes not within any rule of law which prohibits him from being an executor.

An executor derives his office from a testamentary appointment. And if he be a man not prohibited by law from being an executor, the county courts have no right to refuse his qualification.

The case of *Day v. Commonwealth*, to which we have been referred as throwing some light upon this subject, is not, in our opinion, analogous in principle to the question under consideration. That is a case in which the county court of Fleming refused to qualify a deputy who was proposed by the sheriff, because the court believed him unworthy. This court remark substantially, in that case, that though the sheriff has the power to appoint his own deputies, yet the public are interested in the faithful execution of the trust—that this power to appoint his deputies was not reposed in the sheriff for his individual benefit, but for the public good, and, therefore, the county court must be admitted to possess some discretion in guarding the public against an abuse of this power. The difference in principle between that case and this will be readily perceived without any comment from us.

Wherefore the judgment of the county court is reversed, and the case remanded, with instructions to permit the appellant to give bond with sufficient security as required by law, and to be qualified as executor of the last will and testament of Eliza Ann

Hamilton, should he make an application to the court to do so, and to grant him letters testamentary.

WHO MAY BE EXECUTORS OR ADMINISTRATORS.—At common law all persons may be made executors, except those who are specially disqualified. The number of persons so disabled is so small that practically it may be said that any person may be made an executor: Swinb., pt. 5, sec. 1; 1 Williams on Ex. 228; 3 Redf. on Wills, 67; *Stewart's Appeal*, 56 Me. 300. Idiots and lunatics are of course, from want of mental capacity, incapable of becoming executors or administrators: Toller on Wills, 34; 1 Williams on Ex. 238. And it seems that in this country a corporation can not become an executor: *Georgetown College v. Browne*, 34 Md. 450; *Thompson's Estate*, 33 Barb. 334. In England, however, when a corporation is named in a will as executor, it is allowed to designate a person to receive the administration with the will annexed. But this practice does not seem to have been adopted in this country: *Georgetown College v. Browne*, 34 Md. 450. But an infant of ever so tender age, and even a child *in ventre sa mere*, may be named as executor: 1 Williams on Ex. 232; Swinb., pt. 5, sec. 1; Toller on Wills, 30; 3 Redf. on Wills, 68. However, by the statute of 38 Geo. III., c. 87, sec. 6, an infant appointed sole executor is altogether disqualified from exercising his office during his minority, and administration *cum testamento annexo* shall be granted to the guardian, or to such other person as the spiritual court shall think fit, until the infant has attained the age of twenty-one years. But see *Bailey v. Miller*, 44 Am. Dec. 47, 48, where it is said that an infant of tender years could not be an executor. An alien is not disqualified to be an executor, even though his country is at war with the country in which he is appointed: 1 Williams on Ex. 449; Toller on Wills, 32; *Cutler v. Howard*, 9 Wis. 309. Coverture was not, at common law, a disqualification for the office of executrix or administratrix, where the husband consented to the wife's assuming the duties of the trust: Swinb., pt. 5, sec. 1; 1 Williams on Ex. 233; *English v. McNair*, 34 Ala. 40; *Stewart's Appeal*, 56 Me. 300; *Binnerman v. Weaver*, 8 Md. 517; *Gyger's Estate*, 65 Pa. St. 311; *Palmer v. Oakley*, 47 Am. Dec. 41. And her husband's consent will be presumed where the administration is collaterally assailed: *English v. McNair*, 34 Ala. 40; *Stewart's Appeal*, 56 Me. 300. In Massachusetts and in New York it is expressly provided by statute that a married woman may be appointed an executrix or an administratrix. But the statute of Georgia provides that a married woman can not be appointed an executrix or administratrix: See *Leverett v. Dismukes*, 10 Ga. 98. The California code provides that a married woman must not be appointed administratrix: C. C. P., sec. 1370. And under the Texas statute letters of administration can not be granted to a married woman, if her husband refuses to join in the administration: *Nickelson v. Ingram*, 24 Tex. 630. A non-resident may be appointed executor: 1 Williams on Ex. 229; 2 Redf. on Wills, 68; *McGregor v. McGregor*, 3 Abb. App. Dec. 92; *Cutler v. Howard*, 9 Wis. 309. And that, too, although he may have contested the probate of the will, and conveyed away his interest as legatee under it: *McGregor v. McGregor*, 3 Abb. App. Dec. 92. In delivering the opinion of the court in that case, T. A. Johnson, J., said: "I am of the opinion that any person appointed or named as executor in a will is to be deemed competent, unless he is declared incompetent by statute, and that it is the duty of the surrogate to grant letters to every person named as executor in a will, upon his application, who is not declared incompetent to serve by statute.

He has no discretion to exercise in the matter, but must obey the requirements of the statute, which is the sole source of his power."

In England, the spiritual court can not, on account of the poverty or insolvency of a person named in a will as executor, refuse to appoint him: 1 Williams on Ex. 236; Toller on Wills, 32. But if he be insolvent, the court of chancery will oblige him to give security before he enters upon the trust: 1 Williams on Ex. 237; *Rex v. Raines*, Carth. 457; *Duncamban v. Stint*, 1 Ch. Cas. 121; *Rous v. Noble*, 2 Vern. 249; *Batten v. Earnley*, 2 P. Wms. 163; *Slanning v. Style*, 3 Id. 336. In this country it is held that the poverty of an executor, which existed at the testator's death, without maladministration or loss, or danger of loss from misconduct or negligence, will not authorize a court of equity to put him under bonds to perform the trust, or, as an alternative, give up the office: *Willson v. Whitfield*, 38 Ga. 269; *Bowman v. Wootton*, 8 B. Mon. 67; *Shields v. Shields*, 60 Barb. 57; *Fairbairn v. Fisher*, 4 Jones Eq. 390; *Wilkins v. Harriess*, 1 Winst. Eq. 41; *Higginson v. Faber*, 3 Desau. 89. And in *Wood v. Wood*, 4 Paige, 299, 302, the court said: "Previous to the revised statutes, the surrogate was obliged to grant letters testamentary to the executor named by the testator, although he was known to be insolvent." As to the moral qualifications of an executor, Williams says: "There are few or none who, by our law, are disabled on account of their crimes from being executors:" 1 Williams on Ex. 235. In Pennsylvania it is held that a person found by inquisition to be an habitual drunkard is not thereby deprived of his power to perform the office of an executor or administrator: *Sill v. McKnight*, 7 Watts & S. 244; *Imhoff v. Witmer's Adm'r*, 31 Pa. St. 243. But this matter is now regulated by statute in several of the states. In New York it is provided that "no person shall be deemed competent to serve as executor who, at the time the will is proved, shall be: 1. Incapable in law of making a contract (except married women); 2. Under the age of twenty-one years; 3. An alien not being an inhabitant of this state; 4. Who shall have been convicted of an infamous crime; 5. Who, upon proof, shall be adjudged by the surrogate to be incompetent to execute the duties of such trust by reason of drunkenness, dishonesty, improvidence, or want of understanding:" 3 N. Y. R. S. 2289, sec. 3 (1882). The California code provides that "no person is competent to serve as executor who, at the time the will is admitted to probate, is: 1. Under the age of majority; 2. Convicted of an infamous crime; 3. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity."

In Massachusetts the statute provides that, "when an executor or administrator residing out of the commonwealth, having been duly cited by the probate court, neglects to render his accounts and to settle the estate, or when an executor or administrator becomes insane or otherwise incapable of discharging the trust or evidently unsuitable therefor, the probate court may remove him:" Pub. Stat. Mass. 764, sec. 14 (1882). Unsuitableness, under this statute, is held to imply an unfitness arising out of the situation of the person in connection with the estate of which he is administrator, either by reason of his being indebted to it, or having claims against it, or in the interest he has under a will, or his situation as heir at law: *Thayer v. Homer*, 11 Met. 104. An executor or administrator will not be removed, under this statute, as being evidently unsuitable for the discharge of his trust, simply on proof that he was unsuitable at the time of his appointment and without proof that he continues to be so. But if he is shown to be still evidently unsuitable, he will be removed: *Drake v. Green*, 10 Allen, 124. Under the

provision of the California code, quoted above, the "lover" of a woman of the town, who admitted that for five years he had "lived by his wits," was held to be incompetent to serve as executor: *Estate of Plaisance*, Myr. Prob. R. 117. Improvidence, such as to exclude one, under the New York statute, from the administration of an estate, is a want of ordinary care and forecast in the acquisition and preservation of property: *Emerson v. Bowers*, 14 N. Y. 449; *Coggeshall v. Green*, 9 Hun, 471. Improvidence and want of understanding, in order to disqualify for administration, must amount to a lack of intelligence, and are not to be presumed from a simple lack of information upon legal subjects or business matters: *In the Goods of Shilton*, 1 Tuck. (N. Y. Surr.) 73. That an executor is illiterate, of narrow means, and has been guilty of misconduct and mismanagement, is not sufficient cause for removing him as incompetent by reason of improvidence: *Emerson v. Bowers*, 14 N. Y. 449. To render one incompetent to serve as executor on the ground that he is improvident or wanting in understanding, it is not sufficient to show that he has an ill-regulated temper, lacks self-control, and is accustomed to use abusive language towards those named as co-executors: *McGregor v. McGregor*, 3 Abb. App. Dec. 92.

If the circumstances of an executor are such as not to afford adequate security for the faithful discharge of his trust, the surrogate must, under the New York revised statutes, require security, although the testator, at the time of making his will, was aware that the executor was irresponsible: *Wood v. Wood*, 4 Paige, 299. But an executor can be required to give security only when the surrogate is satisfied that his circumstances are such as to render it doubtful whether the property of the testator will be safe in his hands. The mere fact that he is not possessed of property of his own equal in value to that of the estate which the testator has appointed him to administer, is not a sufficient ground for requiring him to give security: *Mandeville v. Mandeville*, 8 Id. 475. In delivering the opinion of the court in *Shields v. Shields*, 60 Barb. 56, 60, Potter, J., said: "The selection of a trustee is the indication of the highest degree of personal confidence; and character, rather than pecuniary responsibility, controls the selection. It would be arbitrary as well as unjust for a court to adjudge that a person of sufficient capacity to make a will had not sufficient to select a trustee to manage his estate as executor." In that case it was decided that the circumstances of an executor are precarious, within the meaning and intent of the statute, only when his character and conduct present such evidence of improvidence or recklessness in the management of the estate, or of his own, as, in the opinion of prudent and discreet men, endangers its security. And in *Martin v. Dukes*, 5 Redf. 597, it was held that thrift, integrity, good repute, business capacity, and stability of character are "circumstances" which may be very properly considered in determining the question of "adequate security," upon an objection under section 2638 of the New York code of civil procedure to the issuance of letters to one named as executor in a will. And it was decided that the word "circumstances" does not refer exclusively to pecuniary responsibility. If an executor has actually renounced of record, he may still come forward, qualify, and enter upon the execution of the functions of his office, provided he does so before administration is granted to another person: *Wood v. Sparks*, 1 Dev. & B. L. 389; *Davis v. Inscoc*, 84 N. C. 396. In Mississippi, the age of eighteen is considered by the statute as the age of majority of an executor named in a will: *Christopher v. Cox*, 25 Miss. 162. It is no disqualification of an executor that he is the executor of a prior executor, between whom and the estate of the testator there are unsettled accounts: *Perry v. De Wolf*, 2 R. L. 103.

WHO MAY BE ADMINISTRATORS.—Many persons may be appointed to act as executors who are not eligible to appointment as administrators. A minor can not be an administrator: 1 Williams on Ex. 450; *In the Goods of the Duchess d'Orleans*, 1 Sw. & Tr. 253; *Abbott v. Abbott*, 2 Phillim. 578; *Collins v. Spears*, 1 Miss. 310; *Carow v. Mowatt*, 2 Edw. Ch. 57. And this is the case whether there is any other next of kin capable of administering or not: *Rea v. Englesing*, 56 Miss. 463. Bankruptcy or insolvency has always been regarded as an insuperable objection to the grant of letters of administration: 1 Williams on Ex. 449; *Hills v. Mills*, 1 Salk. 36; *Cornpropst's Appeal*, 33 Pa. St. 537. A surviving partner of an intestate ought not to be appointed administrator of the latter's estate: *Cornell v. Gallagher*, 16 Cal. 367; *Heward v. Slagle*, 52 Ill. 336; *Estate of Brown*, 11 Phila. 127; even though he may be the brother of the deceased partner: *Cornell v. Gallagher*, 16 Cal. 367. Inability to read or write is not a legal disqualification to act as administrator: *Pacheco's Estate*, 23 Id. 476; *Gregg v. Wilson*, 24 Ind. 227; *Nusz v. Grove*, 27 Md. 391. But in *Stephenson v. Stephenson*, 4 Jones L. 472, it was decided that a woman who could neither write nor read writing, and who had no experience in business, was incompetent and unfit to be intrusted with the administration of an estate, within the meaning of the North Carolina statute. Separation alone does not deprive a wife of her right to administer upon the estate of her husband: *Nusz v. Grove*, 27 Md. 391. Nor does it deprive the husband of his right to administer on his wife's estate: *Case of Jacob Altemus*, 1 Ashm. 49. In some states a non-resident can not be an administrator: Cal. C. C. P., sec. 1369; *Child v. Gratiot*, 41 Ill. 357; *Radford v. Radford*, 3 Dana, 156. But in other states a non-resident may be appointed administrator: *Ex parte Barker*, 2 Leigh, 719; *Jones v. Jones*, 12 Rich. 623.

The statutes of several states of the Union expressly provide what persons are incompetent to serve as administrators. Thus in New York it is enacted that "no letters of administration shall be granted to a person convicted of an infamous crime, nor to any one incapable by law of making a contract, nor to a person not a citizen of the United States, unless such person reside within this state; nor to any person who is under twenty-one years of age; nor to any person who shall be judged incompetent by the surrogate to execute the duties of such trust by reason of drunkenness, improvidence, or want of understanding; nor to any married woman, unless with the written consent of her husband. But with such written consent, she may administer without her husband:" 3 N. Y. R. S. 2291, sec. 32 (1882). The California code provides that "no person is competent or entitled to serve as administrator or administratrix who is: 1. Under the age of majority; 2. Not a *bona fide* resident of the state; 3. Convicted of an infamous crime; 4. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity:" C. C. P., sec. 1369. The improvidence contemplated by the New York statute as a ground of excluding a person from the office of administrator is that want of care or foresight in the management of property which would be likely to render the estate and effects of the intestate unsafe and liable to be lost or diminished in value by improvidence, in case administration thereof should be committed to the improvident person: *Coope v. Lowerre*, 1 Barb. Ch. 45. In the case of *McMahon v. Harrison*, 6 N. Y. 443, it was held that a professional gambler was incompetent to be an administrator, on the ground of improvidence. In delivering the opinion in that case, Johnson, J., said: "We coincide entirely in the views expressed by the chancellor in *Coope v. Lowerre* [*supra*], that this

statute does not at all look at moral delinquency, but regards merely the likelihood of the estate and effects of the intestate being lost or squandered by an improvident person. But so regarding the statute, we should obstinately close our eyes against the light of experience if we failed to recognize the truth that the pursuit of gambling is, in a pecuniary sense, the most hazardous of all pursuits. That it naturally engenders habits of recklessness and extravagance. That whether for the time successful or unsuccessful, it has but one common issue, and that utter ruin. We think, therefore, that the fact of a man being a gambler is *prima facie* evidence of such improvidence as rendered him incompetent to be an administrator."

But it is held that no degree of legal or moral guilt or delinquency is sufficient to exclude a person from administration as next of kin in the cases of preference given by the statute, unless such person has been actually convicted of an infamous crime. The conviction intended by the statute is upon an indictment, or other criminal proceeding. But where a surrogate has a discretion to select between two or more individuals of the same class, he may properly take into consideration moral fitness in making the selection: *Coope v. Lowerre*, 1 Barb. Ch. 45; *Coggsall v. Green*, 9 Hun, 471. Drunkenness to constitute a disqualification must be habitual, continued, inveterate, and irremediable: *Kechele's Case*, 1 Tuck. 52. Under the Massachusetts statute, if a person applying for letters of administration is evidently unsuitable to discharge the duties of the trust, he will not be regarded as entitled to the appointment: *Stearns v. Fiske*, 18 Pick. 24. In New Mexico the appointment of one who is indebted to an estate or against whom a suit is pending on behalf of such estate, as administrator thereof, is regarded as wholly unwarranted by law: *Territory v. Valdez*, 1 N. M. 533. In Maryland it was held to be no objection to the grant of letters of administration to the daughter of an intestate in that state, that she was a nun in a convent in the District of Columbia: *Smith v. Young*, 5 Gill, 197. In Indiana it is held that a person who has been appointed administrator of one estate may be made the administrator of another estate, although there be conflicting claims existing between the estates: *Wright v. Wright*, 72 Ind. 149. In Colorado, administration being governed by statute, the common-law right of the husband surviving the wife, to exclusively administer upon her personal estate, does not exist: *Goodrich v. Treat*, 3 Col. 408. Under the Florida statute a sheriff is not necessarily, by virtue of his office, an administrator, and can not do any act to bind the estate until empowered so to do by the probate court: *Davis v. Shuler*, 14 Fla. 438.

COMMONWEALTH v. MILTON. CITY OF LEXINGTON v. MILTON.

[12 B. MONROE, 212.]

RIGHT OF INDIVIDUALS TO BE CORPORATION AND TO ACT IN CORPORATE CAPACITY is a peculiar privilege, the creation of local law, and can not by the mere force of that law exist or be exercised beyond the territorial limits of the state which enacts it.

RIGHTS SECURED BY SECTION 2 OF ARTICLE 4 OF CONSTITUTION of the United States, to citizens of the several states, are those privileges and immunities that are common to the citizens of any state under its constitution

and laws. But the right of a corporation to do any corporate acts beyond the limits of the state which creates it is not such a privilege or immunity, and can not, therefore, be regarded as embraced within this clause of the constitution.

GUARANTY TO CITIZENS OF EACH STATE OF ALL PRIVILEGES and immunities of citizens in the several states implies no concession by or in one state to the laws of any other state, and imparts no extraterritorial vigor to the laws of any state.

RIGHT OF CORPORATION OF ONE STATE TO EXERCISE ITS CORPORATE POWERS within another state is dependent upon the will of the state in which the exercise of such right is attempted, and is subject to be interdicted by it.

STATE MAY IMPOSE UPON CORPORATIONS OF OTHER STATES TAX for the privilege of carrying on their business within it, although no equivalent burden is imposed upon its domestic corporations.

ORDINANCE PASSED BY CITY, UNDER AUTHORITY OF LEGISLATURE, TAXING INSURANCE COMPANIES is not invalid because it exempts a particular company from the payment of the tax, where such ordinance recites a sufficient consideration for the granting of such exemption.

ERROR to the Fayette circuit court. The opinion states the case.

J. Harlan, attorney general, for the commonwealth.

Robinson and Johnson, for the city of Lexington.

Robertson and H. C. Pindell, for Milton.

By Court, MARSHALL, J. William E. Milton, having, as agent of the Columbus Fire and Marine Insurance Company, incorporated by the state of Ohio, and without authority from this state, effected, in the city of Lexington, Kentucky, various insurances against loss by fire and other casualties, and received therefor a large sum as premiums of insurance, the present proceeding was instituted in the Fayette circuit court for the purpose of having, upon a case agreed between the representatives of the commonwealth and of the city of Lexington, respectively, on the one side, and the said Milton on the other, a judicial determination as to the constitutional validity of the tax imposed by an act of the eleventh of March, 1843, upon insurance companies not incorporated by the state of Kentucky, and of the tax imposed by ordinance of the city of Lexington, under the authority of the legislature.

The sixth section of the act of 1843, Sess. Acts 1842-3, p. 88, entitled "An act to add to the resources of the sinking fund," enacts "that no person or persons within this commonwealth shall act as agent or agents for any individual or association of individuals not authorized by the laws of this commonwealth

to effect insurances against losses by sea or on rivers, in the nature of marine insurances, or insurances on lives, or granting annuities, or against any other loss or peril, whether by rain, flood, fire, or other casualty, by land or water, upon all or any species of property, although such individuals or associations may be incorporated for that purpose by any other state, without a license first had and obtained for that purpose," which the clerks of the several county courts are authorized to issue, on payment to them of the sum of one hundred dollars.

The seventh section of the same act enacts that any person or persons acting as agent or agents for any individuals or association of individuals not authorized by the laws of this commonwealth to effect insurances against losses, risks, or perils, of whatsoever nature, etc., although such individuals may be incorporated for that purpose by any other state, shall pay to the agent of the auditor of public accounts, semi-annually, the sum of two dollars and fifty cents upon every sum of one hundred dollars upon the amount of all premiums received by such agent or agents, or any other person or persons for them, or which shall have been agreed to be paid for any insurances effected or agreed to be effected or procured by him or them, as such agent or agents, against loss or injury sustained, etc. And the said agent or agents are required to furnish, twice a year, to the agent of the auditor, a complete list, under oath, of all such premiums, and also of all such insurances, and pay the said sum of two dollars and fifty cents on every hundred dollars. And any agent or agents who shall offend against the act shall forfeit and pay to the commonwealth the sum of one thousand dollars, to be recovered, etc.; provided, that notwithstanding such forfeiture and payment thereof, such agent or agents shall remain personally responsible for the payment of said premiums, etc. And the principals of such agents, their property, goods, and chattels, shall be liable to the payment of all such judgments, fines, and decrees, and may be proceeded against by action, bill, etc.

By an act of February 9, 1844, Sess. Acts, 1843-4, p. 24, the sixth section of the act of 1843, above recited, was repealed; and the license required by the said sixth section was thus dispensed with, but without affecting the seventh section, and the tax or percentage upon premiums as thereby imposed. But by an act of February, 1847, Sess. Acts, 1846-7, p. 265, the mayor and council of the city of Lexington are authorized to require that all insurance companies and agents of insurance companies

doing business as such within the limits of the city shall take out license, also to prescribe the terms, and require the annual renewal of the license, and to demand and receive for each license a sum not exceeding one hundred dollars. The statute then prohibits any insurance company or agent of an insurance company, whether chartered by the state of Kentucky or not, from making insurance, etc., without such annual license. And imposes a penalty of three hundred dollars for the benefit of the city, and to be recovered in the Lexington city court upon any insurance company, or officer, or agent of one, who shall violate any of these provisions.

Under this act the mayor and council of Lexington passed an ordinance, the first section of which requires the agent of every insurance company then or thereafter established in that city to take out a license to insure, to be issued and signed by the clerk, and countersigned by the mayor of the city, and it recites that the Lexington Insurance Company had contributed toward the fire department in the years 1845-6, the sum of two hundred and forty dollars. The second section requires the agent of every insurance company, upon obtaining license, to execute a bond, etc., in the penalty of two hundred dollars, conditioned to render, on oath semi-annually to the mayor, an accurate account of premiums received during the preceding six months, and to pay to the city three and a half per cent. on the amount of said premiums. The third section imposes upon every agent of an insurance company within the city (the Lexington Insurance Company excepted), who shall proceed to insure anything whatsoever without taking out a license in conformity with the ordinance, a penalty of ten dollars, to be paid to the city, for every twenty-four hours' neglect to take out the license. And the fourth section provides that should the aforesaid percentage on premiums amount to more than one hundred dollars within twelve months, no more than one hundred dollars shall be received by the city.

It is stated in the agreed case, that all the members or corporators of the Columbus Fire and Marine Insurance Company are non-residents of Kentucky, and that said company is not authorized to insure by any statute of Kentucky. It is also stated that the Lexington Insurance Company, in addition to the amount stated in the ordinance, had continued voluntarily to subscribe to the Lexington fire companies one hundred dollars for each year. And it was agreed that, should the statutes and ordinance above recited be deemed valid, judgment should

be rendered in favor of the commonwealth and of the city, for the amount of the tax and license without the penalty.

The circuit court decided that the act of 1843, and the ordinance of the city of Lexington above referred to, were both and each unconstitutional and void, as to the Columbus Fire and Marine Insurance Company, and the defendant Milton, its agent, and rendered a judgment for costs against the commonwealth and the city, each of which prosecutes a writ of error.

The precise grounds or views on which this judgment was founded do not appear in the record. But it is now contended that the act of 1843 is in conflict with that clause of the constitution of the United States (cl. 1, sec. 2, art. 4) which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," and that it is also in violation of that equality and uniformity of taxation which is required by the constitution of Kentucky. The ordinance is also alleged to be in violation of the constitution of Kentucky and of the statute authorizing the city to require a license tax from insurance companies, inasmuch as it exempts from the requisition, and from the tax on the license, the Lexington Insurance Company. We shall consider these objections in the order in which they are above stated.

The repeal of the sixth section of the act of 1843, which was not adverted to in the argument, and was not recollected by the court until after the section was copied in this opinion, does not change essentially either the character of the act or the questions arising under it. The power asserted in each of the sections is that of regulating the business of insurance by subjecting it, when done by agents of individuals or associations not authorized by the laws of this state, to the burden of taxation, either in the form of a tax for license to do the business, or in the form of a tax proportioned to the amount or value of the business done. Or it is the power of taxing for revenue the business of insurance within this state, unless done by individuals or associations in proper person, in their natural capacities and upon their personal responsibility, or by individuals or associations authorized by law. The reference in the act to individuals or associations authorized by the laws of this state was undoubtedly intended to denote corporations created by this state for the purpose of insuring or authorized to insure. Upon these corporations, though effecting insurances by their agents, as they must do, if they effect them at all, no burden or restriction is imposed by the act any more than upon individuals

or associations making insurances in their natural capacity and in person. The discrimination between such corporations and individuals, or associations not incorporated or authorized by the laws of this state to effect insurances, consists in the restriction or burden imposed upon the right or facility of the latter, and not upon the former, to make this contract through the instrumentality of agents.

Whether the legislature of Kentucky has a right thus to discriminate between corporations created by it and the individual citizens of the state, is a question arising under the constitution of Kentucky, and not under that of the United States, certainly not under that clause which secures to the citizens of each state all immunities and privileges of citizens in the several states. And as the act of 1843 makes no discrimination whatever between the citizens of this and those of other states, when acting in person in their natural capacities, but subjects all and each to the same burdens when effecting insurances through the instrumentality of agents; and as, moreover, neither this nor any other statute precludes the individual citizens of other states from becoming members of the exempted corporations, but they are as free to become so at their own option as the citizens of this state are (and it is to be presumed that citizens of this state may become members of foreign corporations), the exemption of the domestic corporations of this state is not a discrimination between the individual citizens of this and of other states, but is only a discrimination between these domestic corporations and the individual citizens of all the states, and between domestic and foreign corporations without regard to the citizenship of their members.

If, therefore, the word "citizen," in the clause of the constitution which has been quoted, refers to citizens in their natural persons, there seems to be no plausible ground for alleging a violation of this clause by the act of 1843. But as the corporations of other states can only act in this state by means of agents, and are therefore necessarily subject to the burdens imposed by this act for making contracts of insurance by agents, while domestic corporations authorized to insure are not subjected to the burden, though acting by agents, there is a substantial discrimination between domestic and other corporations, to the disadvantage of the latter, and it is said that as the business of insurance in this state is done by corporations, and not by individuals, the tax upon individuals insuring by agents, or upon agents effecting insurances for individuals or associations,

is but a device to cover the real object of imposing a tax upon foreign corporations for doing within the state the business of insurance, which domestic corporations may do without being taxed, and that in making this discrimination, the act of 1843 denies to citizens of other states some of the privileges or immunities of citizens of this state, which the federal constitution intended to secure.

If this assumption with regard to the real object of the act of 1843 were conceded, which we are not prepared to do, still, in order to sustain the conclusion contended for, it must be shown either that a corporation, as a mere legal existence distinct from the individuals composing it, is a citizen of the state which creates it, entitled to the benefit of this clause of the constitution and to the privileges and immunities of citizens in every state; or that in denying to the corporations of other states the right of doing within this state in their corporate capacity what similar corporations of this state are allowed to do, or imposing upon such right, if allowed, a burden or tax not imposed upon domestic corporations, some privilege or immunity of the citizens of other states, and which they have, under this clause of the constitution, a right to enjoy on equal terms with the citizens of this state, is withheld from them or improperly burdened.

In reflecting upon the important principles involved in these propositions, a comprehensive answer to each of them suggests itself in the consideration, that it was not intended by this clause of the federal constitution to give to the laws of any one state the slightest force in another state. The clause secures to the citizens of each state in every other state, not the laws or the peculiar privileges which they may be entitled to in their own state, but such protection and benefit of the laws of any and every other state as are common to the citizens thereof, in virtue of their being citizens. And as the citizen of one state does not by virtue of the clause carry with him into any other state, or become entitled to exercise there, any peculiar privileges which he may have enjoyed at home, as being allowed or conferred by the laws of his own state, neither does he acquire by force of this clause any peculiar privileges in another state, except upon the condition on which they may be held or enjoyed by the citizens of such other state. But the corporation itself and its faculties or privileges as such, and the right of individuals to be or compose a corporation and to act in a corporate capacity, are all peculiar privileges, creations of the local law, and can not, by the mere force of that law, exist or be exercised

beyond its territorial jurisdiction; it must, therefore, require the permission, express or implied, of the sovereign in whose territory the corporation attempts to operate, unless the right be secured by the superior power of the constitution.

The constitution certainly intended to secure to every citizen of every state the right of traversing at will the territory of any and every other state, subject only to the laws applicable to its own citizens of exercising there, freely but innocently, all of his faculties of acquiring, holding, and alienating property as citizens might do, and of enjoying all other privileges and immunities common to the citizens of any state in which he might be present, or in which, without being present, he might transact business. But in securing these rights, it does not exempt him from any condition which the law of the state imposes upon its own citizens, nor confer upon him any privilege which the law gives to particular persons for special purposes or upon prescribed conditions, nor secure to him the same privileges to which, by the laws of his own state, he may have been entitled.

In *Corfield v. Coryell*, 4 Wash. 380, Judge Washington characterizes the privileges and immunities secured by this clause as being such as are "in their nature fundamental, which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the several states which compose this Union, from the time of their becoming free, independent, and sovereign." We suppose the same idea is conveyed when we say that they are such privileges and immunities as are common to the citizens of any state under its constitution and constitutional laws. But neither in this comprehensive description of the privileges and immunities guaranteed by this clause of the constitution, nor in the enumeration which follows, is there any reference to corporations or corporate rights, or to any peculiar privileges, or to the right of a corporation to make contracts, or acquire property, or do any corporate act beyond the limits of the state which creates it. And as these can not be regarded as fundamental or common rights or privileges, they seem to be wholly excluded, except so far as the rights of citizens may be involved in the acquired rights of corporations of which they may be members.

If any state, supposing it to be within its own option, should allow a corporation of another state to transact business as a corporation within its limits and to acquire property there, the rights and property thus legally acquired, being held by the corporation for the corporators, may be entitled to the same pro-

tection under this clause of the constitution as if held by the corporators themselves. And as the value of the corporate rights legally acquired, either in the state to which the corporation belongs or in any other, may depend upon the right of suing, to be exercised according to the established forms of proceeding in the corporate name, it may be that the right of suing in the corporate name, which among independent nations would be matter of comity, may, by liberal interpretation, be regarded as one of the privileges and immunities of citizens, to which the corporate citizens of any of the states are entitled in every state. But if this be so, it is not, as we think, because a corporation must be or may be regarded as itself, in view of this clause of the constitution, a citizen of the state which creates it, and is entitled, therefore, to all privileges and immunities of citizens in every state; but because the corporators themselves, being citizens, and the privilege of asserting their rights in the courts being fundamental, they do not lose the benefit of the guaranty, because, in point of form, the suit for their benefit must be in the corporate name. The legality of the act done and of the right claimed by the corporation being established, a remedy for its assertion is due to justice, and is allowed, as we suppose, by all civilized nations. If among these states the right to it is made absolute by the constitution, the mere form of the remedy is of little consequence. And if the sovereignty of the states is somewhat impaired by depriving them of the right of refusing the remedy to corporations intrusted with the interests of citizens, this is done for the advancement of justice, the establishment of which is one of the declared objects of the constitution. And in the perfect reciprocity secured by the guaranty to the citizens of every state in its tendency to establish justice, to insure domestic tranquillity, to promote the general welfare, and to form and preserve a perfect union of the states, and the people intended to be united in one government, the slight restriction thus imposed upon the exercise of sovereignty by the states is fully compensated.

But the most absolute recognition or guaranty to the citizens of each state of all privileges and immunities of citizens in the several states, if limited, as its terms import, to individual citizens as natural persons, and if restricted at all must allow it to be to such privileges and immunities as are fundamental, and therefore presumably common to the citizens of every state in their natural capacities, implies no concession by or in one state to the laws of any other state, and imparts no extraterritorial

vigor to the laws of any state. It is rather a concession to the natural faculties and rights of individuals to the law of nature from which they are derived, and to the principles of benevolence and equality, the prevalence of which marks the advance of civilization and refinement. It is a concession, too, which, while in point of congruity it is due to all individuals who are citizens of the same government, is in no respect inconsistent with the character and objects of the instrument by which that government is created, or with the principles on which the government and the Union are based. If, however, the clause is to be construed as guaranteeing to the citizens of each state, not merely the privileges and immunities common to the citizens of any other state in which they may claim to act as citizens, but such privileges and immunities as the laws of their own state allow or confer upon them, it would at once be perceived that its character of beneficence and conservative liability is changed by the introduction of a principle which, so far as the rights of individuals are concerned, gives full effect in each state to the laws of any and every other state, and thus secures to each state the power of extraterritorial legislation in and over the other states, to the extent that power can be made operative by conferring rights or privileges upon its own citizens to be exercised by them in other states.

But objectionable as such a power would be if confined to conferring rights upon individual citizens, it is fraught with still greater evil if, under the idea that a corporation is itself a citizen, it may exercise in every other state such rights and privileges as are conferred upon it by the state of its locality, and which it may there exercise. As corporations concentrating capital and skill are more powerful than the individuals who compose them, and as corporations may be used for almost every purpose connected with the business and interests of society, the absolute right of the corporations of one state to do in every other state all corporate acts within the powers granted by its charter, is in effect an absolute and almost unlimited power in one or in each state to legislate extraterritorially, by conferring rights within another state, or by conferring upon instruments of its own creation the power of acquiring them there. The apparent reciprocity of the power would prove to be a delusion. The competition for extraterritorial advantages would but aggrandize the stronger to the disparagement of the weaker states. Resistance and retaliation would lead to conflict and confusion, and the weaker states must either submit to have their policy

controlled, their business monopolized, and their domestic institutions reduced to insignificance, or the peace and harmony of the states would be broken up, and perhaps the Union itself destroyed.

Without looking to any extreme consequences, we say that the grant of extraterritorial power to the states is wholly beyond the objects of the constitution, and inconsistent with its character and provisions. For the general purposes of the constitution and the Union, certain powers of legislation and of sovereignty are transferred from the states to the Union, for the preservation of harmony, and for the protection and effectuation of individual rights, the exercise of other powers not transferred is restricted or prohibited, for the same purposes, and to insure and facilitate the attainment of justice, full faith and credit are secured to the public acts and records of each state, and full effect given by the authorized legislation of congress to its judicial proceedings. In the same spirit, fugitives from justice and from labor are to be restored. But we do not, in these or any other provisions, find any grant or recognition of a power of extraterritorial legislation in the states. And as we believe the exercise of such a power would be destructive of the ends of the constitution, and tend to the subversion of the Union, we can not adopt any forced construction or subtile refinement, for the purpose of deducing from the clause now in question the existence of such a power. We believe the constitution grants no power to the states, except through the general government, in which they all participate. It was no part of its object to grant extraterritorial power. None existed in the states before the constitution, and none exists independently of it. We think none is granted by the clause now in question, because it is not granted in terms, and can only be deduced, if at all, by artificial construction, and because, if established by such construction, it would be inconsistent with the character and destructive of the objects of the instrument.

The proposition contended for does not, however, go to the length of claiming an absolute right for the corporations of one state to exercise their corporate faculties in another state, but claims the right of exercising such functions or doing such business in another state as the corporations of that state are allowed to do, and on the same terms. But this proposition is but a mitigated form of the other, and contains the same principle, only more limited in its application. It allows a state to keep out foreign corporations, upon condition that it shall create none for

itself. But should the state consider it necessary, for any of its own purposes, to create a domestic corporation, framed and guarded for the accomplishment of its own objects, and according to its own views of the public safety and advantage, it can only create this necessary instrument of its own, on the condition of losing the power of repelling or restraining the interference of foreign corporations, and on condition of admitting similar instruments of other governments to operate freely within its own territory, in the same manner and to the same extent as is allowed to its own. If such were the written words of the constitution, it might be said that a state, by the act of creating a corporation, consents that similar corporations, created by other states, should come freely into competition with it, since it knows that such would be the legal and necessary consequence. But the act in its own nature implies no such consent, but rather the contrary, since it is an act by which the state attempts to regulate its own affairs, and to subserve its own interests by its own laws. And if the constitution compels it, as the consequence of such an act, to submit to the interference of foreign corporations framed and controlled by foreign laws, it so far subjects it to the legislation of other states, and gives to each state a power within every other state which shall attempt to advance its own internal prosperity by means of domestic corporations.

Even under the limitation stated, the proposition amounts to this, that whatever one state may authorize its corporations to do within its own limits other states may authorize their corporations to do within the same limits, or what is the same thing, their corporations deriving their existence and powers solely from them may do without and against the will of the state within which they choose to operate. There is no grant or guaranty of any similar right or power in the constitution. No such concession is implied in the guaranty to individual citizens of each state, of all fundamental or common privileges and immunities of citizens in the several states; because the corporate existence and functions are themselves peculiar privileges not fundamental or common to the citizens of any state, but only to be acquired on the conditions prescribed in the charter of incorporation, not belonging to a citizen of the same state, merely because he is a citizen, and therefore not belonging to the citizen of another state, either on the ground that he is such a citizen, or that he has become a member of a corporation of the other state, by complying there with the conditions of membership. It is not, therefore, through the privileges

and immunities guaranteed to individual citizens that the foreign corporations, of which they are members, can acquire all the privileges and immunities of domestic corporations. For although the citizenship of the individual corporators may, under this clause, protect the rights of property and contract lawfully acquired by the corporation for them, it does not confer the right of acquisition in the corporate character, because that is not a right pertaining to the corporators merely as citizens, and because if it did pertain to them as citizens of their own state, it would still be a peculiar privilege derived from their own state, not belonging, of course, to citizens of another state, and therefore not guaranteed to the foreign corporators.

It is, then, only by assuming that, in view of this clause of the constitution, corporations are citizens of the states which create them, that they can be brought within the guaranty, so as to entitle the corporations of each state to all privileges and immunities of corporations in the several states. But in view of the character and objects of the constitution, the phrase "all privileges and immunities of citizens," even when applied to natural persons, is restrained so as to embrace such privileges and immunities only as are fundamental and common to freemen in the several states. And if this restriction does not absolutely exclude corporations from the benefit of the clause, except as to rights of property and contract lawfully acquired, the question would still remain, whether all the privileges and immunities of these artificial beings are to be considered as fundamental, and therefore within the guaranty; and if not all, which of them are to be so considered. This inquiry would open a new field for construction or conjecture. And the fact that it has never been explored, and that no court, so far as we know, has ever yet decided that corporations are to be regarded as citizens under this clause of the constitution, and as such entitled to its protection, is an additional reason to those already suggested for not extending the operation of the clause by a strained and unnatural interpretation of the word "citizen" so far as to include corporations, and thereby not only to introduce a new subject of construction and doubt, but a new element of discord and confusion incongruous with the general spirit and character of the constitution and Union, and tending to the subversion of both.

We call the construction contended for a new element, because, heretofore, in this court, and, as we believe, in other courts of the Union, the right of the corporations of one state

to exercise their corporate powers within another state, so as to acquire rights there, has been regarded as a mere matter of comity, dependent upon the will of the state in which the exercise of such right is attempted, and subject to be interdicted by it, though in this family of states its consent might be presumed: *Lathrop v. Commercial Bank of Scioto*, 8 Dana, 112 [33 Am. Dec. 481]; *Atterbury v. Knox and McKee*, 4 B. Mon. 90. In the case of *Bank of the United States v. Deveaux*, 5 Cranch, 84, the supreme court of the United States repudiated the idea that corporations could be considered as citizens, even so far as on that ground to determine their character as parties to a suit under the clause of the constitution giving to the federal courts jurisdiction between citizens of different states, and under the judiciary act of congress defining the exercise of this jurisdiction; and the doctrine of that case was for many years followed in that and the other federal courts. And although in the later case of *Louisville R. R. Co. v. Letson*, 2 How. 497, this doctrine has been overruled, and the supreme court decided that a corporation "is substantially, within the meaning of the law, a citizen of the state which created it, and where its business is done for all the purposes of suing and being sued;" we do not regard this decision upon a question of jurisdiction as fixing upon corporations the character of citizens, except for the assertion of rights lawfully acquired and existing, nor indeed as going further than to decide that they may be regarded as citizens, for the purpose of suing and being sued in the federal courts as citizens of the state of their locality, although some of the corporators might be citizens of other states.

There are, it is true, some expressions in the opinion which indicate that corporations may be regarded as citizens to all intents and purposes. But in saying this, the court went far beyond the question before them, and to which it must be assumed that their attention was particularly directed. They make no reference to the clause of the constitution now under consideration. There is no reason to suppose that they deliberated upon it, or looked to the effect of its application to corporations regarded as citizens. They certainly did not undertake to construe this clause. And their decision that corporations are substantially citizens for all the purposes of suing and being sued does not decide that they are citizens for all or any other purposes, or that they are to be so regarded under this clause of the constitution, or that they are entitled absolutely to exercise within any state but their own all rights, or

to enjoy all privileges and immunities, of domestic corporations. Such a right can not be conceded upon the authority of the case referred to. The privilege of suing, and the form of suing, and the question in what tribunal the jurisdiction as dependent upon the form of the suit is to be entertained, do not reach the question of the privilege of acquiring the rights which are to be asserted in the suit. The exercise of this privilege, we think each state has the right to permit or refuse to the corporations of other states, and therefore to place under such burdens or restrictions as in its own discretion it may deem suitable. So far as the privilege is freely permitted, the rights acquired under it are entitled to the same protection, or the same privileges and immunities, as other similar rights of individual citizens. But if it is permitted under condition, or subject to a burden or tax, the rights acquired under such permission are subject to this burden, though in other respects to be freely asserted or enjoyed.

It follows that, in our opinion, the act of 1843, if it be regarded merely as an act imposing a tax upon foreign corporations, to which domestic corporations are not subjected, and as a burden upon the privilege of exercising their corporate functions in this state, would not be inconsistent with this clause of the constitution of the United States, even if there be no equivalent burden imposed upon domestic corporations in some other shape, as by the requisition of a bonus for their charter, or by the imposition of special duties to be performed for the public benefit. The inquiry whether there is such equivalent burden in a particular case is immaterial. The state having the undoubted right to impose conditions upon the acquisition and exercise of corporate rights created by its own laws, must have a similar right with respect to foreign corporations, and as it can discriminate between its own corporations in prescribing the terms of their creation, so can it discriminate between its own and foreign corporations in prescribing the terms on which the latter may be permitted to exercise their corporate faculty and acquire rights within its territory. And even by its own constitution it could not in the imposition of taxes discriminate between its own corporations and its own citizens, to the disadvantage of the latter, and whether it could or not, any restriction in this respect could not operate in favor of foreign corporations against whom it may discriminate, in favor either of its own corporations or citizens. Individual citizens of other states can not complain of such discrimination, because

as such they have no right to exercise their corporate functions here but by permission, and because the discrimination supposed leaves to them the same privileges and immunities which remain with the citizens of this state.

But the entire discrimination made by the act of 1843, in favor of incorporated insurance companies and against individual citizens, is in allowing the former to insure freely through the instrumentality of agents, which the latter can only do under the burden of a tax. The tax is undoubtedly intended as a restraint upon the mode of making insurance as well as a tax upon insurances made in a different mode. The right of the legislature to create a corporation for the purpose of making insurances throughout the country, and by means of its agents, can not be questioned. And as such a corporation is created, presumably, for the benefit of the community, with such capital as the legislature may deem sufficient, and under such regulations as to its modes of business and its liability as the public safety and interest may require, there may be in the very nature of the institution, and in the objects for which it was created and which it accomplishes, a sufficient consideration for such peculiar privileges as the legislature may, in view of the services required, think proper to confer upon it. And as there may also be very sufficient reasons connected with the safety and interests of the community, for restraining the right of individuals to make insurance through agents, whereby they might extend their contracts indefinitely, to the great detriment of the community, we can not say that there is any usurpation or flagrant abuse of power in subjecting to taxation, and thus restraining insurances by individuals through the instrumentality of agents, and in exempting domestic insurance companies from the tax, when acting as they must do to accomplish the purposes of their creation through a similar instrumentality. In every view, then, we think the act of 1843 is constitutional, and that the state was entitled to judgment against Milton for the tax imposed by that act, amounting to two and a half per cent., upon the premiums on the insurances effected by him, as agent of the Columbus Fire and Marine Insurance Company.

Upon the case of the city of Lexington little remains to be said. The act conferring authority upon the city to tax insurance companies operating within its limits makes no discrimination between foreign and domestic companies; and there seems to be no objection to that act. But it is objected that the ordinance imposing the tax exempts the Lexington Insurance Com-

pany, while it imposes a tax upon all agents or agencies of insurance companies effecting insurance within the city. If this be so, still the ordinance shows by its recital a sufficient consideration for exempting the Lexington Insurance Company from the license tax at the date of the ordinance, and the agreed case shows that this consideration had been continued from year to year by an annual contribution to the purposes of the city, equal to the highest sum which the city was authorized to require for license. This may be deemed a substantial compliance with the law so long as the city might choose to consider it as an equivalent to the license tax. And if it should not be so considered, the proper consequence would seem to be, not that the tax as far as it was authorized should be deemed illegal and void, but that the Lexington Insurance Company might be subjected either to the tax or to the penalty for making insurances in the city of Lexington without a license.

In either view, we think the imposition of the license tax was valid as against the agencies of other companies established and doing business in Lexington, and that the city was entitled to recover it against Milton as the agent of the Columbus Fire and Marine Insurance Company.

Wherefore the judgment against the state and the city is reversed, and the causes are remanded, with directions to render judgment according to the terms of the agreed case in favor of the state and in favor of the city for the sums due to them respectively and for their respective costs.

CORPORATION, WHETHER CITIZEN OF STATE: See note to *Wood v. Hartford Fire Ins. Co.*, 33 Am. Dec. 400.

WHAT PRIVILEGES MAY BE TAXED: See *Stevens v. State*, 35 Am. Dec. 72.

MUNICIPAL CORPORATIONS DERIVE THEIR POWER TO TAX FROM STATUTES: See *Stetson v. Kempton*, 7 Am. Dec. 145, note 151.

CITY ORDINANCE AUTHORIZING INSPECTOR TO MEASURE COAL sold within the city, and allowing him a fee therefor, is not repugnant to the constitution of the United States: *City Council v. Rogers*, 13 Am. Dec. 751.

THE PRINCIPAL CASE IS CITED in *Marshall v. Baltimore & C. R. R. Co.*, 16 How. 352, and in *Phoenix Ins. Co. v. Commonwealth*, 5 Bush, 75, to the point that a corporation is not a citizen for all purposes; and in the last-named case, at page 78, to the point that a state has the constitutional power and right to discriminate against and impose upon corporations chartered by other states a tax for the privilege of transacting business in such state, although no such burden is imposed on like corporations chartered by its own legislature.

BATTERTON v. CHILES.

[12 B. MONROE, 348.]

JUDGMENT IN EJECTMENT DOES NOT OF ITSELF CHANGE CHARACTER OF POSSESSION held by the defendant in the action, nor does it preclude him from relying on the statute of limitations in a subsequent suit, unless the possession was changed by surrender or by the execution of a writ of possession.

PAPER FILED WITH BRIEF OF COUNSEL, but not mentioned in the pleadings, can not be regarded as part of the record in the cause.

LAND FOR WHICH THERE IS ENFORCEABLE JUDGMENT IN EJECTMENT may be sold while in the adverse possession of the defendant in the action. The law against champerty does not apply to such a case.

IN PARTITION SUIT, ALL PERSONS INTERESTED ARE NECESSARY PARTIES.

BILL in chancery. Error to the Bourbon circuit. The opinion states the case.

Davis and Trimble, for the complainant.

Chiles, for the defendant.

By Court, SIMPSON, C. J. Thomas D. Chiles brought this suit in chancery to have a partition of some land within the boundary of William Hoy's patent of one thousand four hundred acres. He claims under Hoy's heirs five sevenths of the land formerly owned by John Evalt, and which was sold and conveyed by the latter to James Trabue; and also five sevenths of the land conveyed by an individual by the name of Jones, to Nicholas Smith, sen. He asserts title to some other land within the aforesaid patent boundary; but as a court of chancery has no jurisdiction upon the matters set forth in the bill, except for the purpose of decreeing a petition, it is unnecessary to advert to any part of his claim but that already alluded to, which embraces the two pieces of land above mentioned.

The court decreed a partition, giving to Chiles five sevenths of both of said pieces of land; from that decree the defendants have appealed, and deny his right to any part of the land claimed by him.

It appears that William Chiles, as early as the year 1821, by virtue of a decree in a suit in chancery in the Bourbon circuit court, which he had previously instituted against the heirs of William Hoy, obtained a deed of conveyance for seven hundred acres of the land included in Hoy's patent, and became thereby invested with the title of Hoy's heirs to that part of the land. He was subsequently required, by a decree of the circuit court of the United States for the district of Kentucky, to convey to

the heirs of Thomas Boone all the land conveyed to him by said commissioner, and under the last-mentioned decree and in execution thereof a deed was made by a commissioner, conveying not only the interest of William Chiles in the seven hundred acres, but also in the residue of the one thousand four hundred acres.

The deed, however, was effectual only so far as it was authorized by the decree. To that extent it was valid, notwithstanding it purported to convey to the heirs of Thomas Boone other land besides that which the commissioners had power to convey, by virtue of the decree. Boone's heirs also obtained a decree and a conveyance in pursuance thereof for the same seven hundred acres of land in the Bourbon circuit court, in which suit William Chiles and the heirs of William Hoy were defendants. By these proceedings, William Chiles and Hoy's heirs were divested of all title to the seven hundred acres of land, and every part thereof. And as Thomas D. Chiles, the complainant, asserts claim to the land in controversy, by virtue of a title derived from William Chiles and Hoy's heirs, since the institution of the aforesaid suits by the heirs of Thomas Boone, it is obvious that he has no available title to any of the land within the boundary of the seven hundred acres. For if he procured any part of his title before the final decrees in the suits brought by Boone's heirs, he is bound by those decrees as a purchaser *pendente lite*, and so far as he obtained deeds from any of the parties subsequent to the date of the commissioner's deeds, no title passed thereby to any part of the seven hundred acres.

The decree of the court below is, therefore, erroneous, so far as the lands formerly belonging to Evalt and Jones are included within the boundary of the seven hundred acres. But as some part of both the tracts seems to lie outside of the seven hundred acres and inside of Hoy's patent, it becomes necessary to consider Chiles' right to a partition of that part.

These two pieces of land appear to have been originally settled under a claim in the name of Flournoy, and were held adversely to Hoy's title. This adverse possession had been continued for more than half a century when this suit was commenced. The statute of limitations, having been relied upon by way of defense, is a complete bar to the claim asserted by Chiles, unless he can derive some aid from a judgment in an action of ejectment brought by Hoy's heirs for this land in 1817, and thereby avoid the bar relied upon by the defendants.

In the action of ejectment alluded to, a judgment was recov-

ered in 1818 for five sevenths of the Evalt tract of land, and also for five sevenths of the tract of land conveyed by Jones to Nicholas Smith. In 1845, a writ of *habere facias possessionem* issued upon said judgment, and was executed by the sheriff by delivering to the complainant, Thomas D. Chiles, possession of one undivided seventh part of the land formerly in the possession of Nicholas Smith, sen., and five sevenths of all the land formerly in the possession of Thomas Evalt.

To preclude Chiles from deriving any benefit from the judgment in ejectment, it is alleged that it was procured by fraud, and should be disregarded. Before the judgment was recovered, a contract had been made between William Chiles, Nicholas Smith, sen., and others, by which Chiles agreed to sell to these parties, at a stipulated price, the land in their possession, and to convey to them Hoy's title to it. It is said that it was a part of the agreement that no defense should be made in the action of ejectment, which, although in the name of Hoy's heirs, was conducted by Chiles, for his own benefit; and that, as to the tract of land sold by Jones to Smith, and as to the land in the possession of Evalt, it is also said Chiles admitted that no recovery could be had under Hoy's title, and that he would not attempt to obtain a judgment for either of said tracts of land. It is further alleged, that the parties in the possession of the land, confiding in these promises and declarations, made no defense in the action of ejectment, although they could have proved an adverse possession for more than twenty years before the action was commenced, of both the Jones and Evalt tracts of lands; and that, notwithstanding the agreement which is alleged to have been made for the purpose of obtaining an advantage over them, and in direct violation of it, Chiles procured a judgment to be rendered in the action of ejectment for five undivided sevenths of the Jones and Evalt land.

It appears that a judgment in the action of ejectment was in the first instance rendered by default, and that at the same term Smith, who claimed and was in the possession of the Jones tract of land, and Evalt himself, and others appeared, and upon their motion the judgment by default was set aside, and they were entered as defendants. At a subsequent term a trial was had, and the judgment referred to was recovered. If no defense had been made in the action of ejectment, but the judgment had been by default, as it was first entered, we should have had no hesitation in deciding that it had been obtained by fraud. The evidence in this case proves most conclusively an

adverse possession of both the Jones and Evalt land, under Flournoy's claim, for more than twenty years before the commencement of the action of ejectment. How it happened that a recovery was had for five undivided sevenths only, when the land was not held under Hoy's title, and the demise was in the name of all the heirs, is an unexplained mystery, and can only be accounted for on the supposition that it was decided by the court, upon the trial, that five out of the seven lessors of the plaintiff were laboring under some disability that saved their right from the operation of the statutory bar, although it was effectual against the other two lessors. Be this, however, as it may, the proceedings in the action of ejectment show that a defense was made, and the plaintiff's claim defeated as to two undivided sevenths of the Jones and Evalt land, either by proof of an adverse possession, or some other fact that protected them, and barred the plaintiff's right of recovery to that extent. The defense thus made, and the result arising from it, are inconsistent with the statement that the parties in the possession of the land relied upon the promise made by Chiles not to sue for that part of the land, and repel any presumption that might otherwise exist that the judgment had been obtained by fraud, consequent upon the false security produced by a reliance on the promises of Chiles, which had been violated and disregarded by him.

Another objection made to the efficacy of the judgment in affording any aid to the complainant in avoiding the operation of time upon his right, arises out of the failure to change the possession, by its instrumentality, until more than twenty years had elapsed after it was rendered. Subsequently to the execution of the writ of *habere facias* that issued in 1845, a motion was made by the defendants therein to quash the writ and the sheriff's return, which was overruled, and one of the grounds upon which the motion was based was the same now relied upon in this objection. The point having been once made and litigated between the parties, and regularly adjudicated upon by the proper court, and the judgment in that case not having been reversed, must be regarded as settled; and can not be again relitigated between the same parties. Besides, the question is one that can not with propriety be made collaterally in this suit, but should be made, as was done, by a direct proceeding to quash the writ, and to have restitution of the possession.

But in this suit, Chiles can not derive any advantage from the judgment in ejectment, except so far as he has obtained, by vir-

tue of it, the possession of the land in contest. The recovery of the judgment in ejectment did not of itself change the character of the possession held by the defendants in that action; nor does it have the effect of precluding them from relying upon the statute of limitations in this suit. So far as Chiles obtained the possession of the land, in pursuance of the judgment in ejectment, he can derive aid from the judgment, and avail himself of the possession thus acquired to defeat the operation of the statute of limitations, but no further. As to the remainder, the statutory bar prevails, and effectually destroys all right to relief. And as the demise in the declaration has expired, he can derive no further aid from the judgment.

The sheriff's return on the writ of *habere facias* shows that the complainant, Chiles, only obtained possession of one undivided seventh part of the Jones tract of land, and five undivided sevenths of the Evalt tract. The counsel of Chiles has filed with his brief a paper purporting to be a copy of a writ of *habere facias* that issued upon said judgment in ejectment in the year 1844, with a return of the sheriff indorsed thereon, that he had "delivered to William Chiles possession of all the lands outside and north of the seven hundred acres as originally laid off and decreed to said Chiles." But this paper can not have the effect to enlarge the right of the complainant, T. D. Chiles, for several reasons. In the first place, it does not form a part of the record, having been brought up by *certiorari*, and therefore can not be considered as belonging to the case now before the court. In the next place, the complainant did not set up in the pleadings and rely upon any possession that had been acquired by William Chiles under the judgment in ejectment, but relied exclusively upon that which he had himself acquired under it, and therefore the writ of possession, if it constituted a part of the record, would not sustain any claim asserted by him.

The defendants had a right to have this matter, if relied upon, presented in such a form that they could have responded to it, which not having been done, it is entirely extraneous, and must be disregarded.

If, however, the complainant's right to a partition, so far as he has obtained possession of the land, by an enforcement of the judgment in ejectment, is not affected by the adverse possession of the appellants, it is contended that, to entitle him to a partition even to that extent, he must make it appear that he is invested with the title of Hoy's heirs, and various objections are made to his title. It is argued that no title

passed by any of the conveyances, except the one made by the sheriff, because the land conveyed was in the adverse possession of the defendants at the time the deeds were executed. But as the land had been recovered by Hoy's heirs before the deeds were made, the case is not within the operation of the champerty law, if the judgment in ejectment was enforceable at the time, notwithstanding the possession was adverse, as this court decided in the case of *Jones v. Chiles*, 2 Dana, 25. The doctrine established in that case does not apply, where the adverse possession has continued until the judgment in ejectment, for some cause, has become unavailing; but in this case the judgment has been enforced, and of course the doctrine must have its full application. Besides, some of the deeds were executed after the sheriff had delivered the possession of the land to the complainant, at a time when no adverse possession existed, and they would be valid if the others were not.

It does not appear, from anything contained in the record, that the wife of John Sappington ever conveyed her title to any person, nor is she named in any of the commissioner's deeds, nor in the deed made by the sheriff, although he was one of the heirs of William Hoy, deceased. But as Hoy's heirs, or those holding under them, had title to so much of the land in contest as was outside of the seven hundred acres decreed to Boone's heirs, and as the complainant was invested with the title of part of the heirs, he had a right to take possession of the land for the joint benefit of himself and the other heirs; and so far as he obtained the possession, he and they have a right to have partition; but unless he can exhibit a title from all the heirs, it will be necessary to make other parties to the suit, as the heirs who have not been divested of their title should be brought before the court.

As, however, the complainant's evidences of title are rendered somewhat ambiguous by the failure to make it appear, in the copies of the decrees exhibited, which of the heirs of William Hoy were made parties to the suits in which the decrees were pronounced, the complainant will be allowed, upon the return of the cause, to produce such other additional evidences of title as he may deem proper: and unless he shall be able to manifest a complete title in himself, he must make such of the heirs parties as still retain the title, but they are to be brought before the court merely for the purpose, and no other, of authorizing a partition to be made, by which they, together with the complainant, will obtain one undivided seventh part of the Jones

tract of land, and five sevenths of the Evalt tract, outside of the seven hundred acres conveyed to Boone's heirs.

Wherefore the decree is reversed, and cause remanded for further proceedings, and decree in conformity with this opinion.

EFFECT OF JUDGMENT AND PROCEEDINGS IN EJECTMENT UPON THE STATUTE OF LIMITATIONS.—The mere recovery of a judgment in ejectment, without the issuance of execution thereon and entry under it, does not stop the running of the statute of limitations in favor of the defendant, nor break the continuity of his adverse possession: *Doe ex dem. Kennedy's Heirs v. Reynolds*, 27 Ala. 364; *Carpenter v. Natoma Water and Mining Co.*, 11 Pac. C. L. J. 571; *Doe ex dem. Bright v. Stevens*, 1 Houst. 240; *Jackson v. Haviland*, 13 Johns. 229; *Smith v. Hornback*, 14 Am. Dec. 122. In the case of *Jackson v. Haviland*, *supra*, Platt, J., delivering the opinion of the court, said: "It is true, the lessor in ejectment may enter after judgment without a writ of possession, and the judgment is evidence of his right of entry, as between the parties and privies, so as to protect him against an action of trespass so long as the effect of the judgment continues. But here the lessor of the plaintiff has waived his right of entry under the judgment, and has slept until the term of the demise has expired; and I think he now stands in the same relation to the defendant as if he had never attempted a legal remedy by the former suit." In the case of *Carpenter v. Natoma W. & M. Co.*, McKee, J., delivering the opinion of the supreme court of California in bank, said: "The judgment in the common-law ejectment determined the plaintiff to have the right of possession during the demise laid in the declaration. Under our laws, ejectment, so called, may be employed to try title, and if the issue is as to plaintiff's seisin in fee, or for a less estate, the judgment in his favor determines that he was seised in fee, or as of the less estate, at the commencement of the action. But the judgment does not create a new estate, or vest a new title in the plaintiff, which interrupts the running of the statute of limitations in case the same has begun to run. The running of the limitation can be interrupted only by an actual entry. The establishment of a right in the lessor of plaintiff to the possession for a term of years did not, as the cases show, interrupt the running of the statute of limitations. There is no reason why the establishment of a right to a larger estate, by the judgment under our law, should interrupt the running of the statute. As an interruption of the statute, the judgment for the recovery of lands under our code is no more effectual than a judgment in a common-law ejectment." And in the case of *Doe ex dem. Bright v. Stevens*, 1 Houst. 244, the court, Wootten, J., charged the jury "that the judgment by default in the former action of ejectment between the parties legally established the right of the plaintiff to the possession of the premises, but unless it was followed by an entry into possession, either by a writ of possession, or personally without writ, but with the consent or by the surrender or abandonment of the defendant, such judgment would have no effect on the defendant's possession, or upon the question of title founded upon her part on an actual and uninterrupted adverse possession of twenty years' continuance."

In reference to the running of the statute of limitations, Wood says: "Although the adverse possession of a defendant in ejectment can not, during the pendency of the suit, ripen into an absolute title under the operation of the statute of limitations, yet the effect of the statute is neutralized only in respect to the particular suit and the plaintiff therein. And after the ter-

mination of that suit, the statutory limitation having meanwhile expired, no subsequent action can be brought, either at law or in equity, to question that title or possession; and if the plaintiff fails therein, the period during which the action was pending is not deducted from the period requisite to gain a title by possession:" Wood on Limitations, sec. 272; *Hopkins v. Calloway*, 7 Coldw. 37. The correctness of the principles established by these authorities is apparent, and seems nowhere to have been judicially questioned, either in those states where the common-law action of ejectment has been retained, or in those states where the fictitious common-law form of action has been superseded by a form of action in which the parties sue and are sued in their own names. A brief consideration of the general effect of a judgment in ejectment will throw light on the subject under discussion, and further fortify the conclusions already reached. At the common law a judgment in ejectment was not in any case conclusive upon the title of either of the parties: Freeman on Judgments, sec. 295; Cole on Ejectment, 77; Adams on Ejectment, 420, 4th ed. by Waterman; Tyler on Ejectment, 585; *Doe v. Seaton*, 2 Crompt. M. & R. 728; *Mitchell v. Robertson*, 15 Ala. 412; *Doe ex dem. Bright v. Stevens*, 1 Houst. 240; *Pollard v. Baylors*, 6 Munf. 433; *Smith v. Sherwood*, 10 Am. Dec. 143; *Crockett v. Lashbrook*, 17 Id. 98; *Hinton v. McNeil*, 24 Id. 315. A judgment in ejectment was not a bar to a subsequent ejectment, though for the same land, and between the same defendants and lessors of the plaintiffs, the fictitious plaintiffs being different: *Clubine v. McMullen*, 11 U. C. Q. B., 250; *Moran v. Jessup*, 15 Id. 612; *Holmes v. Carondelet*, 38 Mo. 551; *Pollard v. Baylors*, 6 Munf. 433. A recovery in ejectment was only for the unexpired portion of the term laid in the demise; after its expiration, the plaintiff could not have execution on his judgment; and if he entered with or without execution he was a trespasser: *Doe v. Reynolds*, 27 Ala. 364; *Wood v. Coghill*, 7 Mon. 601; *Jackson v. Haviland*, 13 Johns. 229; *Smith v. Hornback*, 14 Am. Dec. 122.

A judgment in ejectment never affects an after-acquired title. And a defeated party may, therefore, prove that the right to the possession has come to him since the determination in the former suit: Freeman on Judgments, sec. 302; *Mahoney v. Van Winkle*, 33 Cal. 448; *Emerson v. Sansome*, 41 Id. 552. It is no bar to another suit, or to defenses set up in a subsequent suit, unless the titles and defenses are precisely the same as in the first suit: *Foster v. Evans*, 51 Mo. 39.

In the form of action now usual in the United States, in which the parties sue in their own names, if the respective titles of the parties, or their right to possession, are put in issue and tried and the plaintiff recovers, the judgment is an estoppel and the defendant can not recover the same premises in another action, unless he shows some other right of possession than that which he had when the judgment was rendered: *Marshall v. Shafter*, 32 Cal. 176. But as Rhodes, C. J., in delivering the opinion of the court in *Mahoney v. Middleton*, 41 Id. 53, says: "A judgment in ejectment does not transfer to the successful party the title of the adverse party, but if presented in the proper mode, whenever such adverse title is drawn in issue, it shuts out all proof of such adverse title. Its effect bears a closer resemblance to an extinguishment than a transfer of the adverse title. The judgment awards the possession to the prevailing party, because he had title at the commencement of the action, and because the losing party had no title, or not such title as would authorize him to withhold the possession; but it neither directly nor indirectly transfers the title."

A judgment in ejectment, by default, has the same effect as a judgment

upon a verdict: *Bradford v. Bradford*, 5 Conn. 127; *Aslin v. Parkin*, 2 Burr. 665.

NOTICE MUST BE GIVEN IN CASE OF PARTITION among heirs and devisees, to all who do not join in the petition, or they will not be bound by the acts of the court: *Vick v. Vicksburg*, 31 Am. Dec. 167.

PARTITION AMONG COPARCENERS MADE WITHOUT LEGAL NOTICE to all interested is invalid: *Newby v. Perkins*, 25 Am. Dec. 160.

REVERSIONER MUST BE PARTY TO PARTITION SUIT, WHEN: See *Striker v. Mott*, 22 Am. Dec. 646.

PIPER v. MENIFEE.

[12 B. MONROE, 465.]

PHYSICIAN ATTENDING PATIENTS AFFLICTED WITH INFECTIOUS DISEASES is bound to take all such precautions as experience has found to be necessary, to prevent the communication of those diseases to his other patients. IN ACTION BY PHYSICIAN FOR SERVICES RENDERED TO PATIENT, evidence that while rendering such services he attended patients afflicted with small-pox, and communicated that disease to the defendant, notwithstanding his promise made to the defendant when first employed by him that he would not while attending him wait upon small-pox patients, is admissible for the purpose of reducing the recovery for the services in the performance of which the violation of this promise and the consequent damage occurred.

ASSUMPSIT. Error to the Nicholas circuit. The opinion states the case.

Davis, for the plaintiff.

Cox and Reed, for the defendant.

By Court, MARSHALL, J. This action of *assumpsit* was brought by Menifee, a physician, to recover the amount of his bill for medical services, etc., to the defendant and his family. The case went to trial on the general issue, and after the plaintiff had proved his account, it was proved on the part of the defendant, that on the first visit of plaintiff to attend the defendant, he was sent for while at the defendant's house, to go to one Hoffman's, and was then told by the wife of defendant, who was himself very ill, that if he went to see patients that had the small-pox, he must not come there, but they must employ another physician who had no small-pox patients, to which he replied "he would not, unless Hoffman would be bound for his fee;" that on the next day when he visited defendant again, he was again told by defendant's wife that if he visited any small-pox patients he could not attend on defendant, and he replied he would not visit any small-pox patients. That about ten days

after he was called in, the defendant's wife was pressing him strongly about visiting small-pox patients, and that he must not visit them, when, without admitting or denying that he visited such patients, he said if he visited them he would change his clothes, and there would be no danger.

It was further proved that after the plaintiff had been attending the defendant for about three weeks for fever, and when he was getting better and began to recover from the fever, he broke out with small-pox, and some time after, his son also broke out with small-pox. The defendant then introduced witnesses and offered to prove by them that while the plaintiff was attending on the defendant as above, for typhoid fever, he was also attending on small-pox patients at Hoffman's, and to prove other facts conducing to show that the plaintiff, by his visits to the defendant, had brought with him and communicated to the defendant the small-pox infection, and that there were no other means by which it could have been communicated to him. But the court, on the motion of the plaintiff's counsel, excluded or rejected all the evidence proving or conducing to prove the facts, or any of them, which the defendant thus offered to prove. And exceptions to this decision of the court having been properly taken and reserved, the only question presented in this court is, whether the facts offered to be proved were relevant and material to the issue.

It can not be doubted, that upon the facts offered to be proved, and which are now to be taken as true, the plaintiff was *prima facie* liable to an action. Even if there had been no warning to him by the defendant's wife, it was his duty, in passing from his patients who were afflicted with an infectious and dangerous disease to others who were not so affected, to take such precautions as experience may have shown to be necessary to prevent the communication of the infection by his own visits. But when, in the very commencement of the services, for which a considerable portion of the charges now in question were made, he was expressly warned by the defendant's wife, acting presumably for her husband as well as for herself and the rest of the family, that if he attended small-pox patients, he must not come there, but they would employ another physician, his promises of compliance, constituting as they did the inducement and condition of his further employment, entered into and formed a part of the consideration of the contract on which he sues. And whether they be regarded as being in the nature of a warranty that the family should not be subject to the risk

of small-pox by his visits, or as having been intended to lull their apprehensions, and thus to procure a continuance of his employment by a delusive statement, their violation and the consequent damage constitute, in our opinion, an available ground for reducing the recovery for the services, in the performance of which the violation of these promises and the consequent damage occurred. After the conversation which occurred during the first and second visits of the plaintiff, the defendant and his family had a right to believe that the plaintiff was not visiting small-pox patients, since he had, in effect, promised that he would not visit the defendant while he was attending on such patients, or that he would not attend on such patients while he was visiting the defendant.

Suppose a physician, knowing that he has an infectious disease, continues to visit his patients without apprising them of the fact, and without proper precautions on his own part, and thus communicates the disease to one of them. Clearly the physician thus acting would be guilty of a breach of duty, and of his implied undertaking to his patient, which, whether it be regarded in the light of carelessness, or negligence, or fraud, would render him liable for the consequent damage, including as well the suffering and danger and loss of time, as the expense necessarily occasioned by the second disease, thus produced by his own wrongful act. And if the same physician should cure his patient of the second disease, he would be but compensating in part the damage which he had occasioned, if he rendered his services gratuitously. Might not the patient then resist, or at least reduce, his recovery for the services, by showing that they had been rendered necessary by the plaintiff's own willful misconduct and mistreatment as a physician in his attendance upon the same patient? And might he not resist or reduce the recovery in an action for the original services alone, by showing the misconduct and mistreatment in rendering those services, whereby the patient passed from the first disease into one equally or more dangerous?

The actual case, as presented by the evidence which was offered, is even stronger for the defendant than that which has been hypothetically stated, inasmuch as it may be inferred that the continuance of the plaintiff's employment in the first disease was induced by his promise not to visit small-pox patients while he was visiting the defendant. And although under the doctrine formerly prevailing the defendant might be driven to a cross-action for the recovery of damages, yet as more modern

adjudications, with a view to avoiding circuity of action, and doing full justice in one suit, have allowed the defendant in an action of *assumpsit* to resist or reduce the recovery on the ground of a breach of warranty or of false and fraudulent representations in the same contract, so, upon the same principle, we are of opinion that the facts offered to be proved in this case, being a part of the very transaction and contract on which the recovery is claimed, and tending to prove maltreatment on the part of the plaintiff in his attendance on the first disease, whereby his services in that disease were rendered less valuable, and whereby another disease was produced, for his services, in which he has no just claim to compensation except in reduction of damages claimed against himself, are admissible and material, not by way of set-off, but as affecting the cause of action itself, and as a ground of diminishing or defeating his recovery, so far as his demand is founded upon services rendered either in attending on the defendant and his son in the small-pox or in attending on the defendant in his prior disease, in violation of his promise not to attend small-pox patients while attending the defendant. Indeed, there is some ground for saying that his right to charge the defendant for attendance on the first disease was made expressly dependent upon his not visiting small-pox patients.

In considering the question upon the rejection of this evidence, we of course take the strongest presumption against the plaintiff which the rejected evidence authorizes. In deciding that the evidence was admissible, we only decide that the facts offered to be proved, and the inferences deducible from them, are entitled *prima facie* to affect the damages recoverable by the plaintiff, who, if the evidence had been admitted, would have had, and will have upon another trial, the privilege of disproving the facts relied on, or of offering such explanatory or mitigating evidence as may be in his power. As we have no right to anticipate his answer, it would be inappropriate to say anything as to the effect of any particular answer which he may attempt.

In support of the principle of this opinion, we refer to the case of *Culver v. Blake*, 6 B. Mon. 528, which allows proof of breach of warranty or of fraudulent misrepresentation to be relied on in defense of an action of *assumpsit* for the price of the article sold. To the general duty and liability of medical practitioners as laid down by judges and commentators: Chit. Con. 553, and note 1, referring to *Landon v. Humphrey*, 9 Conn. 209 [23 Am. Dec. 333]; and *Bemus v. Howard*, 3 Watts, 255. Chitty, in the page just referred to, says: "And if the patient

be rather injured than benefited in his health in consequence of any gross unskillfulness or carelessness on the part of his medical attendant, no action for fees can be maintained." We refer also to the case of *Montriau v. Jefferys*, Ry. & M. 317; S. C., 2 Car. & P. 113, in which it was decided to be a good defense to an action on an attorney's bill that the costs were incurred through inadvertency and want of proper caution on the part of the attorney: Chit. Con. 559; and to the case of *Huntley v. Bulwer*, 8 Scott, 325, in which on grounds substantially similar it was held that the attorney was not entitled to recover for his services: Chit. Con. 561.

Wherefore the judgment is reversed, and the cause remanded for a new trial in conformity with the principles of this opinion.

MALPRACTICE, LIABILITY OF PHYSICIAN FOR: See *Landon v. Humphrey*, 23 Am. Dec. 333; *Granniss v. Brandon*, 5 Id. 143; *Cross v. Guthery*, 1 Id. 61.

PHYSICIAN'S LIABILITY FOR NEGLIGENCE: See note to *Howard v. Grover*, 48 Am. Dec. 481, where this subject is fully discussed.

WILLIAMS ET AL. v. HERNDON.

[12 B. MONROE, 484.]

SHERIFF BY LEVY ON PERSONAL PROPERTY ACQUIRES SUCH POSSESSION thereof as enables him to maintain trover for its conversion while in his possession; and if he has made a proper levy, but permits the property to remain in the hands of a bailee on a verbal undertaking to have it forthcoming on the day of sale, his possession continues so as to entitle him to maintain the action against such bailee who has converted it to his own use.

RETURN OF SHERIFF THAT HE HAD LEVIED EXECUTION ON PROPERTY, made by him before the commencement of the suit, is admissible evidence in an action of trover brought by him, to prove that he made such a levy as vested the possession in him.

TROVER. Appeal from the Anderson circuit. The opinion states the case.

J. D. Hardin, Penny, and Harlan, for the appellants.

Herndon and Draffin, for the appellee.

By Court, MARSHALL, J. This was an action of trover brought by Herndon to recover damages for removing and keeping out of his reach property on which he had levied an execution against one of the defendants. The first count in the declaration is in the common form of a count in trover. The second states the facts, specifically showing that the plaintiff was pos-

essed of goods as sheriff. There is no misjoinder of counts or of rights of action, as the counsel seem to suppose. The plaintiff claims no other possession but as sheriff. But his right of action is in his personal and not in his official character. And his character and acts as sheriff, set forth in the second count, are proper to sustain a recovery under the first. The same cause of action is specifically set forth. The demurrer and the motion in arrest of judgment were, therefore, properly overruled. There is no doubt that a levy upon personal property gives to the sheriff such a possession as enables him to maintain trover for its conversion while in his possession. Nor do we doubt that if he has made a proper levy, but permits the property to remain with the defendant in the execution, or any other, on a verbal undertaking to have it forthcoming on the day of sale, his possession continues so as to entitle him to the action against the bailee or any others who may convert it to their own use, and thus prevent him from subjecting it according to law to the satisfaction of the execution.

The principal question in the case is, whether the execution and the return thereon, made by the plaintiff himself as sheriff, apparently regular, and dated long before the commencement of this action, and stating that he had levied upon the property now in question, were admissible evidence for him to prove such a levy as vested the possession in him. If the return was admissible at all to prove the facts stated in it, it was admissible to prove, and was *prima facie* sufficient to prove, that the levy was made according to the duty of the sheriff, and in such manner as to vest the possession in him. And as there is no other evidence tending to show either that there was no levy or the particular manner in which a levy was made, no question arises in the case as to the facts or acts which constitute a legal levy. And the opinions of the court upon that question, whether right or wrong, were not prejudicial to the defendants. The sheriff returned that he levied on the property, and that there was a jury to try the right, who found the property subject to the execution. There is nothing to contradict any part of the return. But the parol testimony corroborates the statement as to the trial of the right of property, and shows that the parties understood that it had been levied on, and that one of the present defendants having it in his possession or control, and claiming it against the execution, promised, when the trial was over and the property found subject, that it should be forthcoming on the day fixed for the sale.

These facts, in addition to the return, authorize the inference that there had been a previous legal levy known to the parties interested. But if the return itself was not admissible as evidence, the case was not properly before the jury. It is to be observed that the plaintiff did not offer to prove by his return that the property had been taken away or withheld by the defendants or any one else, but only that he had levied upon it, there being no mention in the return of what had become of it after the trial of the right. It was the sheriff's duty to make a levy and to enter it on the execution; and if this official statement of an official act which it was his duty to perform and to certify, as he has done, is not to be *prima facie* evidence for him, it would be necessary for him to have and to keep a witness to verify his official acts and statements. We are of opinion that the law does not impose this burden upon an officer, the nature of whose duties are so multifarious and so hazardous. But that in this, as in other cases, it gives verity to his official statements of his official acts required to be done and certified, so far as to throw the burden of disproving them upon those who are interested in so doing. It will not assume that in the regular and timely official statement of his official acts he is making evidence for himself, but rather that he is acting in the discharge of his official duty, and is therefore entitled, like every other member of the community, to the benefit of the evidence which he thus furnished in his official character.

In the case of *Brown etc. v. Commonwealth for Price*, 6 T. B. Mon. 621, which was an action for an escape, the court decided that the plaintiff having read so much of the sheriff's return as showed the capture and escape, the sheriff had a right to read the addition, which stated a fresh pursuit, although this addition had been made by way of amendment with the leave of the court after the original return. And in other cases, as in *First v. Miller*, 4 Bibb, 311, where a part of the return has been held incompetent to prove the fact stated in favor of the sheriff, it was evidently upon the ground that the sheriff was not required or authorized by law to return the particular fact; and not upon the ground that his return regularly made could not be used by him as evidence of a fact which he was required to certify.

We are of opinion, therefore, that the return as read in this case was admissible as *prima facie* evidence between these parties, and that it proved sufficiently a lawful levy on the property in controversy. The questions of fact as to the eloignement of the goods by the defendants jointly or severally, was properly left

to the jury, and their verdict on that point was authorized by the evidence. The mortgage of which S. D. Williams claimed the benefit did not justify his removing or withholding the property which he had promised to have forthcoming; nor did it furnish ground for diminishing the recovery on account of the sum due him by the mortgage, as there was other property conveyed in the mortgage greatly more than sufficient to discharge his demand, and wholly unaccounted for; nor was the verdict for a greater sum than was sufficient to cover the damages sustained by the plaintiff by the conversion of the property, whereby he was rendered responsible for the debt, interest, and costs, and deprived of his commissions on the sale.

There is, therefore, no ground in the evidence or the instructions for disturbing the verdict. And as the evidence offered after the instructions had been given, was perfectly within the power and knowledge of the defendants during the whole course of the trial, and when sifted proves scarcely anything more than they had before proved, the refusal to allow it to be introduced was not an abuse of discretion which requires this court to direct a new trial.

Wherefore the judgment is affirmed.

SHERIFF BY LEVY ON GOODS ACQUIRES LEGAL PROPERTY in them, which will enable him to maintain trover therefor: *Weatherby v. Covington*, 49 Am. Dec. 623; *Brewster v. Vail*, 38 Id. 547; *Dezell v. Odell*, Id. 628; *Lockwood v. Bull*, 13 Id. 539; *Badlam v. Tucker*, 11 Id. 202. In *Poole v. Symonds*, 8 Id. 71, it was decided that where an officer takes goods under a writ, and delivers them to a third person for safe keeping upon his written promise to return them on demand, such person has a sufficient interest in the goods to maintain trover for them. But in *Ludden v. Leavitt*, 6 Id. 45, it was decided that a person to whom a sheriff delivers such goods for safe keeping is merely his servant, having no legal interest in the chattels, and can not, therefore, maintain trover for them.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

BIGELOW *v.* KELLAR.

[6 LOUISIANA ANNUAL, 59.]

TO BIND INDORSER OF PROMISSORY NOTE the holder is bound to make a presentment to the maker, either in person or at his place of residence. It is not sufficient to present it at an office which the maker often visits.

ACTION on promissory note. The facts are sufficiently stated in the opinion.

Race and Foster, for the plaintiff.

Hoffman and Ogden, for the defendant.

By Court, SLIDELL, J. The defendant, Kellar, is sued as indorser of a note made by Black, dated at New Orleans, the fifteenth of August, 1848, and payable twelve months after date. His defense is, that there was not a demand of payment of the maker.

It appears that Black, at the date of the note, resided in New Orleans, but in March, 1849, he gave up the house he rented there, and removed with his children and wife (or a person, at least, with whom he lived as such) to Madisonville, in the parish of St. Tammany. The circumstances of this change of residence were sufficiently strong to satisfy the district judge that Black could not be sued in New Orleans, and his plea of domicile was consequently sustained. The evidence shows that himself and family occupied the house at Madisonville, at the date of the maturity of the note, and for some months subsequent; and down to the trial of the cause, his domestic arrangements, in that particular, do not appear to have been changed.

It appears, however, that he was in the habit of frequently visiting New Orleans. He had kept a shoe-shop in New Orleans, and retired from that business when he removed his family to Madisonville. But some mercantile affairs appear to have remained unsettled. The testimony as to the frequency of his visits is somewhat indefinite; but it may be inferred on the whole that he came to New Orleans once or twice a week. He had given up the office or place of business which he occupied while dwelling in New Orleans; but was in the habit, when he came to town, of resorting to the office of Felch, an intimate friend. He had no commercial books there, but would write letters there, read the newspapers, and make memoranda in a memorandum book which he carried about with him. His habit of resorting to the office of this friend seems to have been generally known, and the inquiries there by persons wishing to see him were frequent. Three days before the note was protested, the notary's clerk went to Felch's office to inquire about Black, and was told that he resided in the parish of St. Tammany, and had no office in that building. It also is proved that the plaintiff was in Madisonville in July or August, 1849, and was told by a person of whom he inquired that Black resided there.

We think it clear that the holder was bound to make a presentment, either to Black personally, or at his new domicile at Madisonville, unless he can be considered, under the evidence, as having a place of business at New Orleans. So that the case turns upon the question whether Felch's office, where the note was presented at maturity, was Black's place of business in such a sense as to authorize a presentment there. Upon this point we think the case is with the defendant. Black's visits to New Orleans were occasional only. He had ceased to transact any regular business there. His presence at Felch's office to receive any demands made upon him was uncertain, nor was any one left there in his absence to answer for him. His removal to Madisonville was brought to the holder's knowledge before maturity, and the answer made to his agent, the notary's clerk, was a timely warning not to treat Felch's office as his place of business.

It is therefore decreed that the judgment be reversed, and that there be judgment as in case of nonsuit; the plaintiff paying costs in both courts.

NECESSITY OF DEMAND AND NOTICE TO CHARGE INDORSER.—An indorser of a note or bill is not liable until payment has been demanded of the maker or acceptor and notice of the dishonor given: *Ecfort v. Des Coudres*, 12 Am. Dec.

609; *Haddock v. Murray*, 8 Id. 43; *Galpin v. Hurd*, 15 Id. 640; *Mohawk Bank v. Broderick*, 27 Id. 192; *Whitaker v. Morrison*, 44 Id. 627; *Goodloe v. Godley*, 51 Id. 159, and cases cited in the notes to the above.

REESE v. STEAMER MARY FOLEY.

[6 LOUISIANA ANNUAL, 71.]

OFFICERS OF VESSELS MUST EXERCISE THE UTMOST VIGILANCE and secure the best means of avoiding accidents when crossing the usual track of steamers in a river in order to be entitled to damages resulting from collision.

APPEAL from the New Orleans fifth district court. The facts are stated in the opinion.

Schmidt, for the plaintiffs.

Walker and Griffith, for the defendants.

By Court, SLIDELL, J. The owners of the steamboat Ben Adams claim from the owners of the steamboat Mary Foley compensation for damages occasioned by a collision, alleged by the plaintiffs to have been caused by the negligence of those in charge of the latter vessel, and without any fault on the part of the plaintiffs.

The Mary Foley was going up the river, and appears to have been pursuing the course usually taken at that point by ascending vessels, that is to say, she was running along the line of vessels moored along the upper wharves of the second municipality, at a little distance from them; but such as does not appear to us, under the evidence, to have been unusual or unsafe. This course is usually adopted for two reasons, namely: to keep out of the current, which is rapid farther out, and to avoid descending boats. The Ben Adams had been moored in a space a few hundred feet wide at the upper part of the second municipality, between a tier of vessels below and a tier of flatboats above, both tiers projecting some distance into the river. She was working out into the river with a barge in tow, and came into collision with the Mary Foley, as the latter was passing. Upon a careful consideration of the evidence, we have all come to the conclusion that the collision must be attributed, in part at least, to the negligence of those in charge of the Ben Adams. It was about the time in the morning when the steam-packets from the city are starting. Ascending steamboats usually pass near the shipping. They may be seasonably descried at a distance from the place where the Ben Adams cast off her moorings, although

not so easily, or rather not so fully, seen as they near or come abreast of the tier of shipping already spoken of. The steam also of the ascending boat may be heard at some distance. A due caution on the part of the officers of a vessel about to emerge from behind the shipping and cross the track of ascending steamers would seem to dictate that they should first assure themselves that no boat was ascending which might intercept their vessel. We feel persuaded that a little diligence thus directed, and which was quite practicable, would have prevented the occurrence of this collision: See *Myers v. Perry*, 1 La. Ann. 374; *Carlisle v. Holton*, 3 Id. 48 [48 Am. Dec. 440]; *Murphy v. Diamond*, Id. 442.

It is therefore decreed, that the judgment of the district court be reversed, and that there be judgment in favor of the defendants; the plaintiffs paying costs in both courts.

LIABILITY OF VESSELS AND THEIR OWNERS FOR INJURIES CAUSED BY COLLISION: See note to *Broadwell v. Swiggert*, 45 Am. Dec. 47, where the subject is treated at considerable length. Damages for collision can not be recovered when the plaintiff did not exhibit a proper prudence, and might with ordinary care have avoided it, although the collision was caused by the gross fault of the captain of the other steamer: *Carlisle v. Holton*, 48 Id. 440.

CARMOUCHE v. BOUIS.

[6 LOUISIANA ANNUAL, 95.]

PARTY WHO FIRES ON SLAVE while the latter is attempting a larceny, and kills him, will be liable *in solido* for his value.

PARENT IS LIABLE FOR ACTS OF HIS CHILD where they are performed under his directions.

HOMICIDE IS NOT JUSTIFIABLE TO PREVENT MERE MISDEMEANORS, or even felonies without force.

APPEAL from the Pointe Coupée district court. The facts are stated in the opinion.

A. Provosty, for the plaintiff.

T. J. Cooley, for the defendants.

By Court, PRESTON, J. The plaintiff has instituted this suit to recover from the defendants *in solido* the value of his slave named John, killed by one of them, Leon Bouis, while in the service of his father, the other defendant.

The testimony shows that in the latter part of September, 1849, the slave was in the act of crossing the fence of the defendant François P. Bouis, who is a sugar-planter, probably for

the purpose of taking sugar-cane, and that there were one or more negroes with him. Leon Bouis, the son, with the overseer, were keeping watch with fire-arms, by direction of the father, he having before lost a considerable quantity of his cane. Leon Bouis fired, and the slave John was severely wounded in the leg, of which wound he lingered and died, notwithstanding all proper care was taken of him and medical aid furnished.

The overseer and son were instructed by the father not to shoot the negroes they might discover trespassing on the fields, but to frighten them by firing; and it appears the son did not take aim when he fired the fatal shot. Nevertheless, he called to the negroes to stop, and they not doing so, he did take aim, and would have fired a second shot, but the gun snapped. And therefore the counsel of the defendants has argued the case principally on the grounds that a person may lawfully beat another in defense of his property, and kill him, if necessary to its defense.

Whether the slave was wounded carelessly or intentionally, we can not reverse the judgment under the circumstances of this case. On the supposition that the son fired without taking aim, and in pursuance of the instructions of his father, to frighten the negroes, he must have fired carelessly, and is responsible for the injury: Code, art. 2295.

If the injury was done intentionally by Leon Bouis, the question arises—which is always to be solved in such cases—Was the wounding or homicide necessary to the defense of the property he was guarding?

The authorities quoted by the defendants' counsel apply to the cases where the killing is necessary to prevent a felony, or when a felony has been committed, the escape of the felons can not be prevented except by killing. In the present case, a trespass only was intended; the trespassers had not yet entered the field, and the least alarm would have driven them off. There may be cases of forcible trespass which would justify a homicide necessary to prevent it: as, for example, in the defense of a man's house, which is his castle, against a forcible entry so violent as to require this extreme resort. So, perhaps, of a trespass upon a man's field to take by force his standing crop, putting the owner in fear. But in the case before us, the necessity to wound or kill, which a case of intended robbery may present, did not exist. The cane the negroes were about to take is not of that class of things for which men commit a robbery, or take by putting the owner in fear. The trespassers intended to commit a misdemeanor, and not a crime.

essed of goods as sheriff. There is no misjoinder of counts or of rights of action, as the counsel seem to suppose. The plaintiff claims no other possession but as sheriff. But his right of action is in his personal and not in his official character. And his character and acts as sheriff, set forth in the second count, are proper to sustain a recovery under the first. The same cause of action is specifically set forth. The demurrer and the motion in arrest of judgment were, therefore, properly overruled. There is no doubt that a levy upon personal property gives to the sheriff such a possession as enables him to maintain trover for its conversion while in his possession. Nor do we doubt that if he has made a proper levy, but permits the property to remain with the defendant in the execution, or any other, on a verbal undertaking to have it forthcoming on the day of sale, his possession continues so as to entitle him to the action against the bailee or any others who may convert it to their own use, and thus prevent him from subjecting it according to law to the satisfaction of the execution.

The principal question in the case is, whether the execution and the return thereon, made by the plaintiff himself as sheriff, apparently regular, and dated long before the commencement of this action, and stating that he had levied upon the property now in question, were admissible evidence for him to prove such a levy as vested the possession in him. If the return was admissible at all to prove the facts stated in it, it was admissible to prove, and was *prima facie* sufficient to prove, that the levy was made according to the duty of the sheriff, and in such manner as to vest the possession in him. And as there is no other evidence tending to show either that there was no levy or the particular manner in which a levy was made, no question arises in the case as to the facts or acts which constitute a legal levy. And the opinions of the court upon that question, whether right or wrong, were not prejudicial to the defendants. The sheriff returned that he levied on the property, and that there was a jury to try the right, who found the property subject to the execution. There is nothing to contradict any part of the return. But the parol testimony corroborates the statement as to the trial of the right of property, and shows that the parties understood that it had been levied on, and that one of the present defendants having it in his possession or control, and claiming it against the execution, promised, when the trial was over and the property found subject, that it should be forthcoming on the day fixed for the sale.

These facts, in addition to the return, authorize the inference that there had been a previous legal levy known to the parties interested. But if the return itself was not admissible as evidence, the case was not properly before the jury. It is to be observed that the plaintiff did not offer to prove by his return that the property had been taken away or withheld by the defendants or any one else, but only that he had levied upon it, there being no mention in the return of what had become of it after the trial of the right. It was the sheriff's duty to make a levy and to enter it on the execution; and if this official statement of an official act which it was his duty to perform and to certify, as he has done, is not to be *prima facie* evidence for him, it would be necessary for him to have and to keep a witness to verify his official acts and statements. We are of opinion that the law does not impose this burden upon an officer, the nature of whose duties are so multifarious and so hazardous. But that in this, as in other cases, it gives verity to his official statements of his official acts required to be done and certified, so far as to throw the burden of disproving them upon those who are interested in so doing. It will not assume that in the regular and timely official statement of his official acts he is making evidence for himself, but rather that he is acting in the discharge of his official duty, and is therefore entitled, like every other member of the community, to the benefit of the evidence which he thus furnished in his official character.

In the case of *Brown etc. v. Commonwealth for Price*, 6 T. B. Mon. 621, which was an action for an escape, the court decided that the plaintiff having read so much of the sheriff's return as showed the capture and escape, the sheriff had a right to read the addition, which stated a fresh pursuit, although this addition had been made by way of amendment with the leave of the court after the original return. And in other cases, as in *First v. Miller*, 4 Bibb, 311, where a part of the return has been held incompetent to prove the fact stated in favor of the sheriff, it was evidently upon the ground that the sheriff was not required or authorized by law to return the particular fact; and not upon the ground that his return regularly made could not be used by him as evidence of a fact which he was required to certify.

We are of opinion, therefore, that the return as read in this case was admissible as *prima facie* evidence between these parties, and that it proved sufficiently a lawful levy on the property in controversy. The questions of fact as to the eloignement of the goods by the defendants jointly or severally, was properly left

and mailed to the residence of the deceased indorser, is a sufficient protest to charge the executor or administrator, without proof of its reception by them: *Pillow v. Hardeman*, 39 Id. 195; *Planters' Bank v. White*, 38 Id. 305; *Merchants' Bank v. Birch*, 8 Id. 367.

MONTGOMERY v. SHIP ABBY PRATT.

[6 LOUISIANA ANNUAL, 410.]

OWNERS OF VESSEL ARE LIABLE for damage to goods caused by improper stowage.

VESSEL SUPPLIED WITH PROPER VENTILATORS is not liable for damage to goods caused by "sweating of the hold."

GOODS RECEIPTED FOR IN GOOD ORDER found to be in a damaged condition at the end of the voyage renders the vessel liable, unless it can be shown that the damage resulted from the act of God, inevitable accident, or the public enemies.

APPEAL from the third district court of New Orleans. The facts are stated in the opinion.

E. Bonford, for the plaintiff.

E. A. Bradford, for the defendants.

By Court, ROST, J. The plaintiff claims from the defendants three hundred and two dollars, being the amount of the alleged damage to one hundred and fifty-eight boxes of tin incurred during a voyage from Liverpool to New Orleans.

The bill of lading states the contents of the boxes, two hundred in number, to be tin plates; and in it the goods are acknowledged as shipped in good order and condition. Upon their receipt in New Orleans, some of the boxes were found to be in bad order. They were examined, at the request of plaintiff, by two persons, one of whom was an inspector for a portion of the New Orleans insurance companies, and the other was a dealer in hardware. They gave a certificate of the result of their inspection, in which they say, "they find the same rusted and damp, apparently from the sweat and dampness of the ship's hold." Upon their examination at the trial, they attributed the injury to the same cause; stating also that the boxes were moldy and the nails rusty. It further appears from the evidence that this sweating of the hold occurs more or less in all vessels, and increases on passing from a cold to a warm climate. It may be partially relieved by ventilation. The Abby Pratt was supplied with ventilators in the most approved form. Goods stowed low are more likely to escape injury from this sweating of the hold

than those stored near the deck. Tin plates are an article susceptible of damage from this cause. The district judge gave plaintiff a judgment for the amount claimed, and the defendants have appealed.

The general doctrine as to the liability of the master and ship-owner is well settled. The cargo must be taken on board with care and skill, and be properly stowed. All possible care must be taken of it by the master during the voyage; and he is responsible for any injury which might have been prevented by human foresight and prudence, and competent naval skill, he being chargeable with the most exact diligence. When goods receipted for in good order are found to be damaged at the end of the voyage, the burden of proof is on the captain and ship-owner to show that the loss was occasioned by the act of God (inevitable accident, as some express it) or public enemies.

The general doctrine is not disputed by the defendants; but they contend that the sweating of the ship's hold is a peril to which all goods transported in ships are exposed, and which must be included among the perils of the sea. It can not, say they, be entirely guarded against; and the testimony shows that every usual and proper means of ventilation was adopted on board the vessel. They also rely upon the testimony of the mate, that the cargo was well stowed.

A difficulty which interposes itself to our reversing the judgment on the grounds suggested is this: It is in evidence that goods which are stowed near the deck are more exposed to the effects of the sweating of the hold than those which are stowed low. And as the goods in question were, from their nature, particularly susceptible of injury from that cause, it would be imprudent stowage to put them near the deck. Now, as a part of this lot of tin plates, which was receipted for in good order, arrived in a damaged condition, and another lot of tin plates brought by the same vessel on the same voyage to another consignee arrived uninjured, the only reasonable mode, under the evidence, of accounting for the damage to a portion of the plaintiff's lot, is by supposing it to have been stowed in a position where it was more exposed to the deleterious influence. But if it was so stowed, it was a fault on the part of the carrier, who was informed what the boxes contained; and he must bear the resulting loss. This is the view of the evidence taken by the district judge. He observes: "I infer from the testimony that tin and other goods liable to be injured by dampness or water will almost to a certainty be injured if they constitute the top part of the

cargo. There was nothing between the tin on board the Abby Pratt and her deck. The upper tier of this tin was, therefore, exposed to probable if not certain injury."

Judgment affirmed, with costs.

LIABILITY OF VESSEL FOR DAMAGES TO GOODS WHILE IN TRANSIT: See *Cameron v. Rich*, 52 Am. Dec. 670, and note thereto.

PATTERSON v. D'AUTERIVE.

[6 LOUISIANA ANNUAL, 467.]

COMMISSIONERS OF ELECTION ARE LIABLE FOR REFUSING TO RECEIVE VOTE from malice and intent to deprive a citizen of his right, or with intent to overawe and control him in its exercise.

APPEAL from the district court of Jefferson. The facts are stated in the opinion.

A. W. Jourdan, for the plaintiff.

F. H. Thompson, for the defendants.

By Court, EUSTIS, C. J. This is an action against the commissioners of an election, held in the parish of Jefferson, for damages for maliciously refusing to allow the plaintiff, a duly qualified voter, to give his vote at a general election in November, 1849. The district judge dismissed the petition, on the ground that the action could not be maintained. The plaintiff has appealed.

The plaintiff alleges that his vote was refused by the defendants maliciously, in order to injure him and deprive him of his legal rights.

The judge erred in dismissing the plaintiff's petition. An action of this kind will lie against the commissioners of an election, when their decision is not the result of error, but of malice and intent to deprive the citizen of his right, or to overawe and control him in its exercise: *Bridge v. Oakey*, 1 La. Ann. 969; S. C., 12 Rob. (La.) 638; *Dwight v. Rice*, 5 La. Ann. 580; *Jenkins v. Waldron*, 11 Johns. 114 [6 Am. Dec. 359].

The judgment of the district court is therefore reversed, and the case remanded for further proceedings; the appellees paying the costs of this appeal.

PRESTON, J., did not sit in this case.

HUBGH v. N. O. & C. R. R. Co.

[6 LOUISIANA ANNUAL, 496.]

MASTER IS NOT LIABLE TO HIS SERVANT FOR DAMAGES resulting from the negligence of another servant, unless the latter is shown to have been habitually careless or unskillful.

SERVANT UNDERTAKES, AS BETWEEN HIMSELF AND HIS MASTER, to run all the ordinary risks of the service.

SERVANT WHO IS GUILTY OF CONTRIBUTORY NEGLIGENCE is not entitled to damages.

CIVIL ACTION CAN NOT BE MAINTAINED UNDER COMMON LAW, by the relative, for the death of a free person.

APPEAL from the fifth district court of New Orleans. The opinion states the facts.

Ogden and Duncan, for the plaintiff.

Benjamin and Micou, for the defendants.

By Court, EUSTIS, C. J. (on rehearing). The plaintiff, the widow of the late Jacob Hubgh, suing in her own right, and as tutrix of her minor children, recovered a judgment of five thousand dollars against the defendants for damage caused by the death of her late husband, by an explosion of the boiler of a locomotive engine on the Carrollton Railroad, while under his management, as an employee of the company at a monthly salary. The explosion is charged to have occurred without any fault on his part, but solely from the negligence of the company in not providing a safe and proper-conditioned boiler, etc.

This court reversed the judgment of the court below, and rendered judgment for the defendants. One of the grounds of the reversal was, that the action could not be maintained; another was, that the facts in evidence brought the case within the rule, that a master is not liable to a servant for damages resulting from the negligence of another servant, unless that other servant was habitually careless or unskillful.

A very elaborate argument for a rehearing has been presented, in which the doctrine of the court, as to the action, has been reviewed.

All our sympathies are necessarily in favor of relieving the unfortunate dependents on the daily labor of the deceased; and the frequency of late of deplorable accidents of this kind has created a general sentiment of indignation against those who, by their neglect or recklessness, are the cause of so much suffering among the relatives of the unfortunate victims. The impression that they ought to be indemnified results from a sense of justice

which all right-minded men must acknowledge. Would not any one who had the misfortune to kill his fellow-man at once feel a disposition to aid those whom his act, however called for by necessity, had reduced to want or deprived of their daily support? There are few men who would be insensible to this obligation; and accordingly we find in the most approved writers on natural law a formal recognition of it as a duty. But the ground on which Grotius, with whom the idea originates, places it, excludes all idea of its forming a part of the civil law, or being the basis of an action. Speaking of the indemnity to be made in cases of injury, he goes on to state some examples of what the indemnity, which the party committing the wrong is bound to make, consists.

A man who has unjustly killed another ought to pay the expenses incurred for his physicians, and give to those whom the deceased was bound to support, as his father and mother, his women and his children, the amount of their maintenance, according to the age of the deceased. Thus Hercules, having slain Iphytus, paid a fine to his children, in order to secure more easily an expiation of his crime. A commentator of Aristotle says, that what one gives to the wife, the children, and other dependents of the person slain, is given in some sort. "When I speak of homicide, I mean an unjust homicide, that is, one committed by a person who had no right to do the act from which the death has ensued. If one has the right to endanger the life of another, however one may have sinned against charity, as in case of not taking to flight, he is not responsible for the death, so far as relates to the indemnity of which we are now treating. Besides, a price may be put upon the life of a slave, who can be sold; but the life of a free person is not susceptible of valuation." The author refers, in a note to the title in liber 9 of the digest, which is the title, *De his qui effenderint*, which, in case of a free man's having been injured by an object thrown into the street, provides: "*Cicatricem cautem aut deformitatis nulla sit aestimatio, quia liberum corpus nullum recipit aestimationem*"—there is no estimate made of the scars or deformity produced, because the value of the body of a free man can not be estimated in money.

This author did not profess to treat of jurisprudence, but he declared the principles of natural law and the laws of nations, from the writings of the philosophers, poets, historians, and orators of antiquity. He does not confound one with the other, and distinguishes both from the civil or municipal law. He, it

will be observed, is obliged to consider this indemnity rather as a matter of gift or liberality; an affair of conscience, rather than an obligation of strict duty.

Rutherford, in his Institutes of Natural Law, dissents from the opinion of Grotius, in his discrimination between the valuation of the life of a free man and of a slave, and thinks that, in case of the slaying of either, his life can be estimated according to the interest which those who survive have in it: Book 1, c. 17, sec. 9.

It is understood that the present action is founded upon the direct injury to themselves by the death of Hubgh, from the causes alleged in the petition; and is not attempted to be maintained as a right transmitted to them through the deceased. The right of action is claimed on the ground on which it has been allowed in France; the articles of the codes of that country and of Louisiana being identical, which provide that every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it: Code Napoleon, 1382; La. Code, 2294. A very thorough consideration of the subject brought us to the conclusion that the interpretation and application of the article 1382 of the code Napoleon, adopted by the court of cassation in relation to the responsibility of the slayer to the widow and heirs of the deceased, were not consistent with our jurisprudence, and consequently inadmissible. We found no precedent for any such action, though, unfortunately, occasions for its exercise have been but too frequent within our borders; and with the learning and research which have distinguished our bar for nearly half a century, the singular fact remains unexplained, that up to the present suit no such right of action has been asserted. There can have been but one cause for this; and that is, the universal conviction of the bench and the bar that no such action could be maintained.

It certainly is incumbent on the plaintiff to show that, under our laws, the death of a free person can be the ground of an action of damages. That, as a general principle, no such rule prevailed under the Roman law, we think may be affirmed. If it existed, it has escaped the research of Gibbon and of Makel-day; and the diligence of counsel has referred us to no text or commentator which authorizes the opinion that the action was allowed. The Aquilian law gave actions for injury done by the death of slaves and certain animals, which it mentions by name. The title, *De his qui effunderint vel dejecerint*, thus provides for the case of a free man killed by something being thrown in the

public way from a building. If it is a free man who has been killed, *damni æstimatio non fit in duplum, quia in homine libero nulla corporis æstimatio fieri potest*; but in this case the fine is of fifty pieces of gold: Ff., lib. 9, tit. 3, sec. 3. The law *de suspensis* is to the same effect, and had for its object the prevention of accidents in the public way. They were penal laws, and the special provisions they contain are rather in affirmance of the non-existence of the principle which would give an action to the heir for damages caused by the death of his ancestor.

Far be it from us to undertake to state affirmatively that any given text is not to be found in the mass of matter composing the *corpus juris civilis*. Finding no rule laid down in any of the elementary writers on which the action could be maintained, and bearing in mind the principle so frequently recognized in the digest, that the life of a free man can not be made the subject of valuation, we thought that an action of this kind could not be maintained under the Roman law: Dig. 14, tit. 11; *De lege Rhodia de Jacta*, sec. 2, 1. *Jacturæ summam pro rerum pretio distribui oportet. Corporum liberorum æstimationem nullam fieri posse*: Dig. 9, tit. 1, sec 4.

The Spanish law provided with great particularity for the reparation of wrongs, and for the remedy to be exercised by and against heirs in these cases. It would seem that every possible case to be reached by the law was provided for; a recapitulation of them would rather afford mirth than instruction. The only case in which we discover any responsibility, except to punishment for homicide, is that relating to barbers, who are required to exercise their trade in particular places, so that they whom they shave may sustain no damage. The law provides that if a barber be shaving a man, and any one push him in any manner, so that he kill, wound, or hurt the person whom he is shaving, he by whose fault it was done will be bound to make reparation therefor, etc. This solitary case, if it gave the heir an action for the death of his ancestor, would rather prove the necessity for making a special provision for it, and presupposes the general rule to which it is an exception: Institutes of the Law of Spain, partida 7, tit. 15, law 27; Id., tit. 7, 9. We can find nothing in the laws of Spain which authorizes this action, or which presupposes any such right of action to exist, and are satisfied that, as a general rule under both systems, actions for injuries to the person are strictly personal; and that there is no recognized principle in either in which the plaintiff's action can be maintained.

The obligation resulting from a tort can only be the ground of an action when the obligation is recognized and ratified by the law: for by far the greater portion of the wrongs to which we are exposed in our artificial condition of society the law does not afford any redress. The redress is of necessity confined to legal rights, for which the law has provided an action or inflicts a punishment: 3 Bla. Com. 23, 117; Pothier on Obligations, No. 1, 197.

We now come to consider whether the plaintiff's right of action is authorized by the articles of our code. The article 2294 of our code provides, that every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. The provisions of this article, however general and comprehensive its terms may be, are found more than once recited in terms equally general and comprehensive in the laws of the fifteenth title of the seventh partida. The article was inserted in the code of 1809, at a time when the Spanish laws were in force. It was put and retained to this time in the code, not for the purpose of making any change in the law, but because it was a principle which was in its proper place in the code; a principle which would be equally recognized as a necessary conservative element of society, and equally obligatory, whether it was formally enacted in a code or not. Would an injunction in an article of a code, *jus suum cuique tribuendi*, or, *sic utendi tuo ut alienum non lædas*, under the duties implied, be more extensive or more obligatory? Merlin, in giving his conclusions before the court of cassation, in the case of *Michel, Reynier et al.*, respecting the article 1382 of the code Napoleon, which is identical with the article 2294 of our code, says: "The principle laid down in article 1382 is not new. It is drawn from the natural law; and long before the Napoleon code, the Roman laws had solemnly proclaimed it; long before that code, the French laws had recognized and assumed its existence." Merlin, Rep., *verbo*, Reparation Civile, secs. 2, 3, bis.

Toullier thus alludes to this article: "See how the learned Domat, in his clear and precise style, has developed the principles consecrated in our articles 1382 and 1383: 'All losses, all damages which may come from the act of a person, whether from imprudence, levity, ignorance of what he is bound to know, or other like faults, however light they may be, ought to be repaired by him whose imprudence or other fault has caused them. It is a tort that he has committed, though he may have had no intention to injure.' It is in this that the *quasi delict*

differs from the *delit* and *dol.*” Toullier, vol. 11, sec. 153; Domat, Civil Law, b. 2, tit. 8, sec. 4.

The argument is, that the article 2294 must be interpreted in the same sense here as the article 1382 is interpreted in the courts of France; that so important a provision would not have been taken literally from the French code, without any restriction or reservation being made, unless it was designed to receive the same construction as it was known to receive in France. So far as the fact is concerned, of the interpretation given by the court of cassation to that article being known in Louisiana when the code of 1809 was adopted, our impression is against it. The dates of the decisions of that court, cited by the learned counsel, are subsequent to that time; and the declaration of the imperial attorney general, in the case just cited, in the year 1813, rather weakens the supposition of there being any fixed interpretation of the article, as contended for. Within the memory of several who are still actively engaged in the profession, there was a period in which the jurisprudence of that court was not generally known in Louisiana. Indeed, it was not until after the general peace, in 1815, that the means of obtaining that knowledge was afforded by the introduction of Toullier and other works, commenting upon the code Napoleon. The course adopted by our predecessors, upon whom was imposed the delicate and difficult task of interpreting and applying the provisions of the codes—a course in which we have felt ourselves bound to continue, in expounding and applying these provisions—we think is an answer to the argument. Conceding it to be true, that the present jurisprudence is as stated by counsel, and that the decisions of the court of cassation, on this article, are correct—a proposition which we have no interest in questioning—does it follow that our decisions ought to be the same on the article in our code which is identical? We think not; and for this reason, that the systems to which the articles apply are not similar.

This court, and the former supreme court, have derived great assistance from the decisions of the court of cassation (which on all proper occasions has been acknowledged), on the articles of the Napoleon code similar to those of our own code; but the benefit to be derived from such decisions is necessarily limited to those cases in which the articles are to be applied to similar systems, or to a similar jurisprudence. A large portion of the code of 1808 was taken from the Napoleon code: the differences between the two codes resulted from the Spanish law being the

law of Louisiana. The laws of Spain remained in force and unrepealed until 1828. Our courts were called upon to apply the articles of the code to the law as it existed at the time; and the decisions made in this state of things form the present jurisprudence of the state.

It seems to be evident, that the decisions of the court of cassation, to whatever extent they may have been considered as furnishing a safe guide to the application of the articles of the code of Louisiana, similar to those of the French code, in cases in which the former jurisprudence was similar to that of France, would cease to be applicable in those subjects of law in which the jurisprudence of the two countries was different. The application of the article of the code Napoleon to be made is to the law of France; and would, under the sanction of that distinguished tribunal, furnish a safe rule in cases where the law was similar; and, of course, no rule whatever, where the law was materially different. In the case, therefore, under consideration, the law being different in Louisiana from that of France, as the latter is assumed to be, in argument; and the application of the article being to the law of Louisiana, and not to that of France, the import and sense of the article become entirely an open question; and the responsibility of determining its application is thrown upon the court without the aid of any authority, and unrestricted by any interpretation.

Previous to the adoption of the code Napoleon, the traces of the legislation of the conquerors of Gaul were everywhere perceptible throughout the kingdom, and the code itself has not entirely effaced them. Subject to the power of Rome for more than five centuries, conquered afterwards by the Franks, the Roman law and the Germanic customs became the sources of the law in France. In the south, the Roman law prevailed; being near the territory of Rome, the first conquered, and the last subjected to the power of the Franks. A part of the north also retained the Roman law; it having long remained separated from France. The rest of the north and the whole center of France, where the Franks planted and maintained themselves, more particularly observed the Germanic usages. Hence, the distinction of the *pays de droit écrit*, and the *pays de droit coutumien*. In the *pays de droit*, there were certain places and cities, which had their local customs in derogation and exception of the Roman law; as Bordeaux, Toulouse, Montpellier, and others.

France, in its present extent, having been formed by the annexation of adjoining territories, they were permitted to main-

tain, as far as practicable, their laws and usages. Hence several hundreds of different customs prevailed in the different portions of her territory, until the supreme authority of the Napoleon code was established throughout. The authors of that immortal work, in its formation, permitted to remain whatever it was not necessary to destroy; and as far as practicable, sought to make a compromise, as it were, between the customs and the Roman law.

Under the Roman law, any citizen could institute a prosecution for a crime. In France, the right was vested in the public officer; but the relations of the deceased, in case of homicide, had the power of prosecuting the slayer. The reparation sought partook of a punishment and a debt. It was adjudged equally in favor of the accused and the accuser: in favor of the accused and against the accuser, if he was innocent; and in favor of the accused, if he maintained his accusation. Pothier, Procedure Criminelle, sec. 2; Merlin Rep., *verbo*, Reparation Civile.

The probability is, that originally all prosecutions for homicide were at the instance of the relatives of the deceased. Blackstone assigns a northern origin to this custom, which prevailed in England. The appeal spoken of as a criminal prosecution denotes an accusation by a private subject against another, demanding punishment rather on account of the particular injury suffered than for the offense against the public: 4 Bla. Com. 313. The sum adjudged was known to the ancient jurisprudence of France under the name of *fine*; the same as that adjudged for the benefit of the owner. In the examination of this subject, we have not been able to find, in any of the authors, that this mode of prosecution had any definite origin; or that the right to receive reparation, on the part of the relation, for the death of the slain, had any foundation in the Roman law.

Conceding that it was the intention of the framers of the code Napoleon to embrace the civil reparation of an injury caused by homicide to the relations of the deceased, and that the court of cassation decided correctly in the interpretation and application of the article 1382, we do not feel authorized to give to the similar article of our code the same application, in a system of laws different from that prevailing in France, in which the code Napoleon was to operate.

We consider it unquestionable, that no civil action can be maintained under the common law by the relations, for the death of a free person. The authorities which have been

adduced and commented upon, we think, conclusively show it. Finding that no such action was even instituted in this state, our inquiries were necessarily directed to the examination of the former jurisprudence of Louisiana, in order to ascertain whether the action could be based on any well-recognized principle in the Roman or the Spanish laws. If the uniform understanding of the bar, deducible from the fact that no such suit was ever brought, has recognized the prevalence of the same principle in this state which has obtained in England and the United States, the present state of things, on this subject, it would not be proper to disturb for light reasons, or for anything short of a clear and decided command of the law. There is nothing shown which would authorize a court to abandon a course which has been followed by a people with whom a regard for all personal rights is paramount, and from whom we have derived a large portion of our laws, and been continued in by the states of the Union. In England, the law has been recently changed; and it will rest with the legislative power alone to provide the remedy sought, if public policy requires its introduction.

On the merits, we think the case is clearly with the defendants. We thought that by the deceased's own want of care, he contributed to the disaster on which the plaintiffs found their action; and on that ground as well as on that stated in the opinion of the court, resulting from the authorities cited, the plaintiffs have no claim for damages against the defendants.

The rehearing is therefore refused.

LIABILITY OF MASTER TO SERVANT FOR DAMAGES RESULTING FROM NEGLIGENCE OF FELLOW-SERVANT.—A master is not liable to servant for negligence of fellow-servant, although the latter is the foreman: *Brown v. Maxwell*, 41 Am. Dec. 771, and note referring to other cases published in this series.

PLAINTIFF GUILTY OF NEGLIGENCE CONTRIBUTING TO INJURY occasioned by defendant's negligence can not recover therefor: *Kennard v. Burton*, 43 Am. Dec. 249, and note.

DORD v. BONNAFFEE & Co.

[6 LOUISIANA ANNUAL, 563.]

CONTRACTS MADE BY WRITTEN COMMUNICATION between residents of different countries will be considered as made in the country where the final assent is given.

CONTRACT MADE IN FOREIGN COUNTRY by an agent without authority, which is afterwards ratified by the principal, will be considered as made in the country where the latter resides.

ASSIGNMENT FOR BENEFIT OF CREDITORS, when made in a country where such assignments are legal, will be valid against all creditors who are residents of countries governed by similar laws.

ASSIGNMENT FOR BENEFIT OF CREDITORS, when made in New York and valid there, will be treated as valid in Louisiana.

APPEAL from the fourth district court of New Orleans. The facts are stated in the opinion.

A. N. Ogden, for the plaintiff.

W. C. Hanmer, for the defendants.

By Court, EUSTIS, C. J. This suit was commenced by attachment. The appeal is taken by the plaintiff, from a judgment of the court of the fourth district of New Orleans, dismissing his petition, on the ground that no property of the defendants was attached. The plaintiff attached certain assets in the hands of Eugene Rousseau, under process of garnishment. The garnishee claims to hold the assets, as assignee of the defendants, for the use of their creditors. The plaintiff traversed the answers of the garnishee, and alleged that the assignments under which he claims to hold are, on their face, fraudulent, null, and void as to creditors; and that no title to the property was thereby vested in the assignee, which can prevail against his attachment. The argument before us is on the validity and effect of the assignments.

Edward Bonnaffée and Charles Bonnaffée were merchants, residing in Havre, France, and there trading under the name of Bonnaffée & Co. The assignment purports to be made by them in favor of Eugene Rousseau, by their attorney in fact, Charles Bonnaffée, in the city of New York, on the eleventh of December, 1847. It purports to transfer to the assignee all the property of the firm of Bonnaffée & Co., all the assets, etc., originating from or connected with a bankrupt banking concern in the state of Mississippi; and to be in furtherance of a certain other assignment, bearing the same date, made by the said Bonnaffée & Co. to Victor Delannay and Charles Sagony, of the city of New York. This assignment is also signed by Charles Bonnaffée, as attorney in fact of Bonnaffée & Co., of Edward and Charles Bonnaffée. Both of these assignments were afterwards formally ratified by the principals in France.

The plaintiff is the holder of several bills of exchange, drawn by the agent in New York, in the name of the firm, on the house in Havre, protested for non-acceptance and non-payment. His residence is in the city of New York. In considering by vir-

tue of what system of laws the rights of the respective parties, in relation to the assignment, are to be determined, the first question among those raised in argument, to be determined, is, as to the place in which the contracts were made in a legal sense. They were both signed in the city of New York, by Charles Bonnaffée, as agent. That in favor of Delannay and Sagony, so far as they are concerned, may be considered as having been executed in that city; as they both resided there and signed the assignment. That in favor of Rousseau, he at the time being a resident of Jackson, in the state of Mississippi, may be considered, so far as he is concerned, as executed in that state; as the last consent may be held to be given by his acceptance of the assignment. But whether to be considered as executed there or in New York, as the laws in relation to instruments of this class are not supposed to be different, it is not material to inquire. The difficulty appears to be, the place in which the contracts were made by Edward Bonnaffée and Charles Bonnaffée, the parties of the first part to the assignments.

It is not insisted that the assignments, as made by the agent in New York, derive any validity from his signing them, as his authority to make them has not been shown. But the formal ratification of both instruments, by the parties in Havre, is urged as supplying this original want of authority on the part of the agent. It is held, that in cases of contracts, made between persons who are separated from each other in different countries, by written communication, the contracts are considered as made in the country, and subject to its laws, where the final assent has been given. This rule is laid down by Casaregis, in his one hundred and seventy-ninth discourse; and was recognized by the supreme court, in the case of *Whiston v. Stodder*, 8 Mart. 95 [13 Am. Dec. 281]. In case of a contract made in a foreign country, by an agent without authority, which the principal at home afterwards ratifies, the contract is considered as made in that foreign country, because the ratification relates back *tempore et loco*, and is equivalent to an original authority: 2 Casaregis, p. 210, discourse 179, sec. 20. The property upon which the assignments were to operate, so far as this case is concerned, must be considered at the time as being in the state of Mississippi or of New York; therefore, there can be no question as to the laws by which the effect of the assignments, in relation to the attaching creditor, are to be tested.

Neither of the assignments purports to have any other object than an equal distribution of the property of the firm in the

United States among their creditors, without discrimination, or to make any appropriation of it, except that which the law of France and of Louisiana would itself make. Their purpose was laudable in every point of view, and one which the laws of every state must approve and encourage. We think, from the authorities adduced, that the assignments are unquestionably valid under the laws of New York. We are bound to consider the decisions of the courts of the last resort of that state as evidence of what the law is.

The case of *Cunningham v. Freeborn*, 11 Wend. 241, appears to afford a complete answer to the objections taken by the counsel of the plaintiff, to the validity of the assignments. The district judge, in his written opinion, has given his conclusions on the law of the case, in which we fully concur. The several grounds of objection to the assignments have been examined in detail, in the written argument of the counsel for the assignee. As the questions raised involve points in a jurisprudence which is not our own, we do not feel ourselves called upon to do more than give the result of our investigations, which is in favor of the validity of the assignments under the law by which they are to be tested; and that they vest the property conveyed in the assignee, subject to the trusts, for the benefit of all the creditors. The interest thus created can not be defeated by the attaching creditor, in the case presented to us.

The judgment of the district court is therefore affirmed, with costs.

FOREIGN ASSIGNMENTS, VALIDITY OF: See *Richardson v. Leavitt*, 45 Am. Dec. 90; *President etc. of Natchez v. Minor*, 48 Id 727, and notes to same, referring to other cases published in this series.

BRYAN v. GLASS.

[6 LOUISIANA ANNUAL, 740.]

SALE OF IMPROVEMENTS UPON PUBLIC LANDS to one who has a right to pre-emption will constitute a valuable and legal consideration for a promissory note.

APPEAL from the district court of Claiborne. The facts are stated in the opinion.

Lawson and Fuller, for the plaintiffs.

Spofford and Ray, for the defendant.

By Court, PRESTON, J. This suit is brought on a promissory note, given by the defendant to Green Allen, for an improvement on the public land. The improvements consisted of good log cabins and a hundred and fifty acres of cleared land. Allen had lived upon the land until he had lost the right of purchasing it from the United States by pre-emption. Still, the improvements were valuable to him. It was a home for his family, established by his labor. The quantity of cleared land was sufficient, also, to enable him to support a family, and no one could dispossess him except the United States, or their vendees. It is to be presumed, too, until the contrary appears, that he made the improvements, not as a trespasser, but with the laudable and lawful purpose of entering it, and may have been prevented by his poverty from purchasing it from the government.

We have no reason to believe that the defendant purchased the improvements with a view to trespass on the public land, but, on the contrary, are bound to presume that, being in a situation to enter the land, the defendant not only bought the improvements, but intended to purchase, and did purchase, the right of occupancy, with a view to acquire the land by pre-emption, upon his own possession. The improvement was therefore valuable also to the defendant, and he enjoyed the value for a year, and might have entered the land; but changing his mind or being unable to enter it, he offered it for sale, to afford others the opportunity to enter government land already improved without appropriating to himself the result of another's labor, which in morals belongs to him, although not protected by law.

The purchaser of the improvements, in this case, being, as we presume, entitled to enter the land, and having purchased them for that purpose, they afforded a valuable and legal consideration for the note sued upon. And in this respect, the case differs from those relied upon in which the purchaser of the improvements could not have entered the land.

The judgment of the district court is reversed; and it is decreed that the plaintiffs recover from the defendant the sum of five hundred dollars, with interest at the rate of eight per cent. from the first day of January, 1849, until paid, and costs in both courts.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

STATE v. SMITH.

[32 MAINE, 369.]

COMMON-LAW RULE THAT DEATH OCCURRING BY ACT OF ONE in pursuit of an unlawful design, without any intention to kill, will be either murder or manslaughter according as the intended offense is a felony or only a misdemeanor, is in force in Maine.

DISTINCTION BETWEEN FELONY AND MISDEMEANOR in case of offense, in perpetration of which another's death is caused, depends upon the gradation made by statute, not upon the common-law classification.

OFFENSE WHICH MAY BE PUNISHED BY IMPRISONMENT IN STATE PRISON is a felony under the Maine statute, and its character remains unchanged by the fact that it may also be punished merely by imprisonment in the county jail or by imposition of a fine.

PRISONER IS TO BE CONSIDERED INNOCENT UNTIL HIS GUILT IS PROVED.

TO CONVICT OF MURDER JURY MUST BELIEVE BEYOND ALL REASONABLE DOUBT, in view of all the testimony, that the defendant is guilty, but it is not requisite that they should believe a particular witness beyond all reasonable doubt.

WHATEVER ALLEGATION IN INDICTMENT IS DESCRIPTIVE OF OFFENSE MUST BE PROVED.

FACT STATED IN INDICTMENT MAY BE REJECTED AS SURPLUSAGE if it be merely in aggravation, so that it may be stricken out and yet leave the offense fully described.

ALLEGATION THAT DECEASED WAS QUICK WITH CHILD NEED NOT BE PROVED, and may be disregarded by the jury on the trial of an indictment for murder resulting from an attempt to procure an abortion, as such allegation is not essential to a description of the offense.

THAT DEATH RESULTED FROM USE OF SPECIFIED METALLIC INSTRUMENT described in an indictment for murder, committed in an attempt to procure an abortion, need not be proved on the trial, but it will be sufficient if the death is proved to have resulted from the use of some other instrument, if the nature of the violence and the kind of death occasioned by it be the same.

DEGREES OF MURDER UNDER MAINE STATUTE ILLUSTRATED.

PHYSICIAN MAY TESTIFY AS EXPERT TO PREGNANCY OF DECEASED, and may give his reasons for his belief, after having made a *post-mortem* examination of the body, on the trial of an indictment for murder caused by an attempt to procure an abortion.

PHYSICIAN MAY GIVE HIS OPINION OF CAUSE OF DECEDENT'S DEATH, after having made a *post-mortem* examination of the body, on the trial of an indictment for murder caused by an attempt to procure an abortion.

INDICTMENT for the murder of Beringera D. Caswell. It was alleged in the indictment that deceased was pregnant and quick with child, and that the defendant, attempting to procure an abortion, applied to the person of Beringera a certain metallic instrument, which was particularly described, and thereby caused her death. Upon the trial a witness testified that he was an experienced medical practitioner, and that he had made a *post-mortem* examination of the body of the deceased. Counsel for the state then asked him if he believed the deceased to have been pregnant, and if so, to state his reasons for such belief. Defendant's counsel objected. The court admitted the evidence, on the ground that the witness was an expert. The witness thereupon stated his belief that deceased had been pregnant, and described the appearances of the body upon which he based his conclusions. The court also, against the objection of defendant's counsel, allowed the witness to give his opinion as to the cause of her death. Counsel for the defendant urged that even if the facts as alleged in the indictment were proved, nevertheless they did not constitute murder. For the ordinance of the common law was still in force in this state, that where death occurs by the act of one in pursuit of an unlawful design, without any intention to kill, it will be either murder or manslaughter according as the intended offense is a felony or only a misdemeanor; and causing abortion is at common law not a felony. They claimed that this rule of the common law could not be evaded by the fact that the legislature had made that offense a felony. They further argued that even under the Maine statute this offense was not made a felony. To make any offense a felony under this statute they claimed that it must be punishable in the state prison; but this offense was not a felony, because it was made punishable either by imprisonment in the state prison or in the county jail or by a fine. The jury returned a verdict finding the defendant guilty of murder in the second degree.

Clifford and Wilkinson, for the defendant.

Tallman, attorney general, for the state.

By Court, SHEPLEY, C. J. 1. The rule, adverted to by counsel, touches those cases of homicide only in which there was no intent to kill, and that rule is in force in this state. It was adopted, however, without any view to perpetuate the ancient classification of offenses, but with reference to such graduation of crimes as might from time to time obtain in this state.

2. By the revised statutes, c. 167, sec. 2, any offense which may be punished by imprisonment in the state prison is made a felony. If the offense be one liable to such a punishment, it is a felony, and its character in that respect does not at all depend upon the sentence which a court may pronounce.

The other legal positions upon which the case was decided are sufficiently exhibited in the following few particulars of the charge given to the jury by

Shepley, C. J. Gentlemen of the jury: Upon you, in some degree, depends the just administration of the law. If you disregard the law, the promises which it makes to the citizen, of life, liberty, and the pursuit of happiness, become unreliable. But happily your course is a straight one, fraught with no difficulties. With the opinion of others, in the court-room or out of it, you have nothing to do. If your duty be faithfully performed, you can, in no event, have cause for regret.

The defendant is to be considered innocent until his guilt be proved.

Does the evidence satisfy you: 1. That the body, found in the brook, was that of Beringera D. Caswell? 2. That she was pregnant, and that the defendant, at her desire, had procured an abortion? 3. And that, in so doing, he caused her death?

[The evidence, as applicable to each of these inquiries, was fully recapitulated by the judge.]

In examining the testimony it is not requisite that you should believe a particular witness beyond all reasonable doubt; but it is requisite that, in view of all the testimony, you should believe, beyond all reasonable doubt, that the defendant is guilty.

The indictment, in its third count, charges that the deceased was quick with child. Whatever allegation is descriptive of the offense must be proved. But if the fact stated be merely in aggravation, so that it may be stricken out, and yet leave the offense fully described, it may be rejected as surplusage. In order to fix upon the defendant the guilt of the offense charged upon him, it is not requisite to be either alleged or proved that the deceased was quick with child. Such an allegation is not essential to the description of the offense. It is merely in

aggravation, and you may disregard it. It is alleged in the indictment, that the death was caused by the use of a specified metallic instrument. But it is not necessary that the proof should show that it was done by that particular instrument. It will be sufficient if proved to have been done by some other one, if the nature of the violence and the kind of death occasioned by it be the same.

Whoever shall unlawfully kill any human being with malice aforethought, either express or implied, shall be deemed guilty of murder.

Whoever shall commit murder with express malice aforethought, or in perpetrating or attempting to perpetrate any crime, punishable with death or imprisonment in the state prison for life, or for an unlimited term of years, shall be deemed guilty of murder in the first degree.

Whoever shall commit murder, otherwise than above described, shall be deemed guilty of murder in the second degree.

For an illustration of murder in the first degree, suppose that a person breaks into your house with a dangerous weapon, for the purpose of stealing your money; that he is detected and seized by your son, and that the robber strikes the son a blow by which his life is taken. Now the robber may have had no ill-will against your son, and no aforethought purpose to kill him; yet, as the crime which he did intend, and did attempt to commit, is punishable by imprisonment in the state prison for life, and therefore a felony, the killing would be murder in the first degree.

To illustrate murder in the second degree, we may suppose a person should attack another and strike him a mortal blow with a deadly weapon; though there be no proof of previous design, or ill-will, or unkind feelings, yet the law allows the malice to be implied; that is, it allows the inference of a heart void of human kindness, depraved, and fatally bent on mischief.

Another case of murder in the second degree, and where the malice is implied, is when the killing is committed by a person when in the perpetration of a crime punishable by imprisonment in the state prison, such crimes being made felonies by our statute. As the willful causing of an abortion is "punishable in state prison," it is a felony; and if, in the perpetration of that offense, a killing occurs, the malice, making it murder in the second degree, may be implied.

The jury returned a verdict that the defendant was guilty of murder in the second degree. After having rendered that ver-

dict, the court, at the request of the defendant's counsel, and by consent of the prosecuting officer, inquired of the jury, before they had left the jury-box, whether it was upon the third count that they rendered that verdict. They answered that it was upon the third count, and that they did not come to any finding upon either of the other counts.

Tallman, the attorney general, by whom the case was argued for the state, then moved for sentence, and the defendant was sentenced to suffer imprisonment in the state prison for life, agreeably to revised statutes, c. 154, sec. 3.

This case was again before the court, and is reported as *Smith v. State*, at page 607 of this volume.

DISTINCTION BETWEEN MURDER AND MANSLAUGHTER: See *Sutcliffe v. State*, 51 Am. Dec. 459, and note; *Commonwealth v. Webster*, 52 Id. 711, and note 736, collecting prior cases in this series. In *Wellar v. People*, 30 Mich. 20, the principal case is cited to the point that unless the intended offense in the perpetration of which the death is caused is a felony, the killing will be manslaughter.

PROCURING ABORTION WITH CONSENT OF MOTHER IS NOT INDICTABLE AT COMMON LAW unless mother is quick with child: *State v. Cooper*, 51 Am. Dec. 248; *Commonwealth v. Parker*, 43 Id. 396.

MURDER IN FIRST DEGREE, WHAT IS: *Whiteford v. Commonwealth*, 18 Am. Dec. 774; *Bower v. State*, 32 Id. 325; *Anthony v. State*, 33 Id. 143.

DISTINCTION BETWEEN MURDER IN SECOND DEGREE AND MANSLAUGHTER: See *Slaughter v. Commonwealth*, 37 Am. Dec. 638, and cases cited in note.

EVERY MATERIAL FACT MUST BE PROVED BEYOND REASONABLE DOUBT to justify a conviction in a criminal case: *Hipp v. State*, 33 Am. Dec. 463; *Findley v. State*, 36 Id. 557; *Sumner v. State*, Id. 561, and note.

MEDICAL TESTIMONY SHOULD BE RECEIVED WITH CAUTION, and unless sustained by reasons drawn from facts is of little weight: *Clark v. State*, 40 Am. Dec. 481. Expert testimony is received upon a fact of which a jury could not judge with the requisite knowledge and certainty: *Jefferson Ins. Co. v. Cotheal*, 22 Id. 567.

CHARACTER OF OFFENSE AS FELONY IS DETERMINED BY TEST OF STATUTE, not by sentence which the court may pronounce. The principal case is cited to this point in *Commonwealth v. Pemberton*, 118 Mass. 43.

PULCIFER v. PAGE.

[32 MAINE, 404.]

OWNER OF PRINCIPAL MATERIALS ACQUIRES BY RIGHT OF ACCESSION the right of property in the whole where the materials of two persons are united by labor into a joint product.

TRESPASS for an iron chain. Plaintiff and defendant each had a chain which had been broken into various pieces. Plaintiff

carried the broken pieces of the two chains to a blacksmith, and had them united so as to make two other chains. Defendant carried away one of these chains, a part of which was formed by a part of his own chain. The action was for this chain. To the instruction mentioned in the opinion, the defendant excepted.

Goodwin, for the plaintiff.

Woodman, for the defendant.

By Court, HOWARD, J. This case presents a question of acquisition of property by accession, but does not involve an inquiry concerning the admixture or confusion of goods. It is a general rule of law, that if the materials of one person are united to the materials of another by labor, forming a joint product, the owner of the principal materials will acquire the right of property in the whole by right of accession. This was a rule of the Roman and of the English law, and has been adopted, as it is understood, in the United States generally: Dig., 6, 1, 61; Bracton de acq. rerum dom., b. 2, c. 2, secs. 3, 4; Mollay, b. 2, c. 1, sec. 7; Pothier, *Trait du droit de propriété*, l. 1, c. 2, art. 3, No. 169–180; 2 Bla. Com. 404; 1 Bro. Civ. Law, 241; *Glover v. Austin*, 6 Pick. 209; *Sumner v. Hamlet*, 12 Id. 83; *Merritt v. Johnson*, 7 Johns. 474 [5 Am. Dec. 289]; 2 Kent's Com. 361.

The distinctions and qualifications that may be appropriate and necessary in the application of this doctrine to a variety of cases that may arise do not require consideration in determining this case. The first instruction stated was favorable to the defendant, and forms no ground of exceptions for him; and the plaintiff does not complain of it. The second instruction, that "if the plaintiff had only incorporated into this chain some small portion of the defendant's chain, without his consent, not exceeding two or three links, the chain would not by the incorporation of such small portion become the property of the defendant," is understood to be in accordance with the rule of law before mentioned, and is not erroneous.

Exceptions overruled, judgment on the verdict.

TITLE BY ACCESSION.—Accession is a term derived from the Latin *accessio*, which was the title of one of the three methods of originally acquiring property. The three "natural" means of originally acquiring property under the laws of Justinian were *occupatio*, where that which belongs to no one is acquired by him who first takes it; *accessio*, or accession; and *traditio*, or a transfer of ownership. The rules of the Roman law in respect to *accessio*

were introduced into the common law of England by Bracton: 2 Bla. Com. 405; 2 Kent's Com. 361. "The right of accession is defined in the French and Louisianian codes, to be the right to all which one's own property produces, whether that property be movable or immovable, and the right to that which is united to it by accession, either naturally or artificially:" 2 Kent's Com. 360. Accession is the acquisition of property of a concomitant nature, by virtue of the ownership of the principal to which it is accessory, or is attached as an incident: Abb. Law Dict. Title by accession is nearly allied to if not in fact a subdivision of title by occupancy: 2 Bla. Com. 405. *Accessio*, or accession, is either natural, artificial, or mixed: Colquhoun's Rom. Civ. Law, vol. 2, sec. 979. Natural accession is where addition is made to the original property by the operation of nature without premeditated human design. Thus where, by the action of erosive agencies, land is gradually washed away and deposited upon another's land, the owner of the land upon which the deposit is made acquires the added land by accession. This, however, forms a separate head in the law under the name of "alluvion." Natural accession gives islands formed in a stream to the owner of the adjacent land. The law on this subject is embraced under the head of "accretion." The owner of land acquires its natural produce, and the owner of animals their offspring, by right of natural accession. Artificial or industrial accession is that which is produced by the labor and industry of man. Under this head is embraced those cases where out of given materials a new thing is produced, or where the goods of two persons are mingled, which is sometimes called "confusion of goods;" or where a building is erected by one upon the property of another, that is "fixtures." Mixed accession, so called because the forces of nature and the acts of man combine, includes those cases where one sows or plants in the ground of another. The law of emblements finds a place here, and under this head are also to be classed those products which one obtains from his own land by means of labor, such as grain and fruits: See Colquhoun's Rom. Civ. Law, vol. 2, secs. 979-995; Bouv. Law Dict., *Accessio* and *Accession*; Ortolan's Rom. Law, by Mears, p. 147, sec. 361. With the exception of "confusion of goods," the divisions of the subject which have been mentioned as embraced under other heads, namely, alluvion, accretion, emblements, and fixtures, will not be treated in this note.

1. NATURAL ACCESSION—ALLUVION AND ACCRETION: See note on alluvion: *Hagan v. Cambell*, 33 Am. Dec. 276; see also *Adams v. Frothingham*, 3 Id. 151; *Emans v. Turnbull*, Id. 427; *Chapman v. Kimball*, 21 Id. 707; note to *Emerson v. Taylor*, 23 Id. 536; *Deerfield v. Arms*, 28 Id. 276; *Municipality No. 2 v. Cotton Press*, 36 Id. 624; *Middleton v. Pritchard*, 38 Id. 112.

INCREASE OF ANIMALS BELONGS TO OWNER OF FEMALE.—"Of all tame and domestic animals the brood belongs to the owner of the dam or mother; the English law agreeing with the civil, that *partus sequitur ventrem* in the brute creation, though for the most part in the human species it disallows that maxim. And therefore in the laws of England, as well as Rome, *se equam meam equus tuus prægnantem fecerit, non est tuum sed meum quod natum est*. And for this Puffendorf gives a sensible reason: not only because the male is frequently unknown, but also because the dam, during the time of her pregnancy, is almost useless to the proprietor, and must be maintained with greater expense and care; wherefore, as her owner is the loser by her pregnancy, he ought to be the gainer by her brood. An exception to this is in the case of young cygnets, which belong equally to the owner of the cock and hen, and shall be divided between them (citing the *Case of Swans*, 7 Co. 17). But here the reasons of the general rule cease, and cessante

ratione cessat ipsa lex, for the male is well known by his constant association with the female, and for the same reason the owner of the one doth not suffer more disadvantage, during the time of pregnancy and nurture, than the owner of the other:" 2 Bla. Com. 390. Increase of domestic animals belongs to the owner of the female: *Stewart v. Ball*, 33 Mo. 154. The natural increase of a mare belongs to her owner, and it will belong to the wife when she owns the mare and the husband has no control over her personalty: *Hanson v. Millett*, 55 Me. 184. But it will belong to the husband though the dam be purchased with the wife's earnings, if the earnings belong to the husband: *Hazelbaker v. Goodfellow*, 64 Ill. 238. The increase of cattle *ad infinitum* belongs to the owner of the original stock. So where administration had not been taken out on an estate consisting of a stock of cattle for forty years, and the original stock was completely gone, yet the stock formed from the increase of the original stock was assets: *Tyson v. Simpson*, 2 Hayw. 147. The increase of mortgaged live-stock is covered by the mortgage, and a purchaser from the mortgagor takes subject to the lien: *Gundy v. Biteler*, 6 Ill. App. 510; *Kellogg v. Lovely*, 46 Mich. 131; S. C., 41 Am. Rep. 151. But an exception is made where the owner of the female clothes another with a special property therein, and where the dam is hired for a limited period, the increase belongs to the usufructuary: *Wood v. Ash*, Owen, 139; *Stewart v. Ball*, 33 Mo. 154. A colt foaled while its dam is held under bailment or an executory contract of purchase, by the terms of which the title is to remain in the bailor or vendor until the agreed price is paid, is, however, subject to the terms of the contract, and is the property of the vendor or bailor: *Elmore v. Fitzpatrick*, 56 Ala. 400. "The Roman law made a distinction in respect to the offspring of slaves, and so does the civil code of Louisiana. Though the children were born during the temporary use or hiring of the female slave, they belonged not to the hirer, but to the permanent owner of the slave:" 2 Kent's Com. 361. But in *Concklin v. Havens*, 12 Johns. 314, it was held that the offspring of a female slave would be the property of the life tenant of the slave, on the principle that the temporary proprietor of an animal is entitled to the increase of it. One who delivers animals and their increase to another for a certain time, having no property in the increase, can not maintain trespass against one who takes them from the bailee: *Putnam v. Wyley*, 8 Johns. 432. But a father who loans cows to his daughter owns their young: *Orser v. Storms*, 9 Cow. 687. Where a bequest is made of a flock or herd to a tenant for life, he, taking the increase, is bound to keep up the number of the original stock: *Horry v. Glover*, 2 Hill's Eq. (S. C.) 521. When one agrees that if another will take his mare to horse he shall have the foal in payment, the foal will belong to the second party: *Linnendoll v. Doe*, 14 Johns. 222.

OWNERSHIP OF TREES AND NATURAL PRODUCTS.—A tree belongs to the owner of the land in which the root grows: *Waterman v. Soper*, 1 Ld. Raym. 737. If the roots of a tree growing near the division line between the property of two parties extend into the soil of each party, the tree will belong to the owner of the land in which the tree was first planted: *Holder v. Coates*, Moo. & M. 112. The old folio case of *Masters v. Pollie*, 2 Roll. 141, was a case of trespass for carrying away boards. The defendant claimed that he had a right to the boards carried away, as the tree from which they were made, although the body of it was on the plaintiff's land, was partly nourished by his land through some of the roots which extended into it. The court held the defendant in the wrong, remarking that the plaintiff "can not limit the roots of the tree, how far they shall grow and go." A tree growing upon the dividing line between the property of adjoining owners, and obtain-

ing nourishment from the soil of both, is common property: *Anon.*, 2 Roll. 255; *Griffin v. Bixby*, 12 N. H. 454. And one tenant in common may have an action of trespass against the other for cutting it down: *Waterman v. Soper*, 1 Ld. Raym. 737; *Griffin v. Bixby*, 12 N. H. 454. Standing trees are the subject of parol sale, so as to give the purchaser the right to go upon the land and cut them down, whereupon they become the personal property of the purchaser: *Gale v. Seeley*, 15 Vt. 221. The title to ice is in the possessor of the water where it is formed, but the sale of ice in the water is a sale of personalty: *Higgins v. Kusterer*, 41 Mich. 318.

2. ARTIFICIAL ACCESSION—BESTOWAL OF LABOR UPON ANOTHER'S PROPERTY.—The title to chattels is not changed by a bestowal of labor or skill upon them by a willful wrong-doer in manufacturing them, or changing them into a commodity of another kind. No matter how great the transformation may be, the true owner may follow and reclaim his materials as far as he can prove their identity. So a willful trespasser taking corn and converting it into whisky acquires no title to it: *Silsbury v. McCoon*, 3 N. Y. 379; S. C., 53 Am. Dec. 307, reversing S. C. in 4 Denio, 332, which was a confirmation of S. C. in 6 Hill, 425; S. C., 41 Am. Dec. 753; so where coal is made from timber: *Curtis v. Groat*, 5 Id. 204; or trees are made into rails and posts: *Snyder v. Vaux*, 21 Id. 466; *Lampton v. Preston*, 19 Id. 104; or into railroad ties, and sold to *bona fide* purchasers: *Struber v. Trustees of Cincinnati R'y*, 78 Ky. 481; S. C., 39 Am. Rep. 251; or where the timber has been made into shingles the owner may retake it wherever he can identify the original materials, even though the trespass may have been compromised: *Betts v. Lee*, 5 Johns. 348; S. C., 4 Am. Dec. 368. One who enters the land of another and cuts the grass growing thereon, and makes it into hay, has no property in it, and no action against one by whose negligence the hay was destroyed while stacked on the land: *Murphy v. S. C. & P. R. Co.*, 8 N. W. Rep. 320.

A willful trespasser can acquire no title by accession to the property of another, unless he has utterly changed its character, and formed out of it another species, so that its identity is lost: *Cross v. Marston*, 44 Am. Dec. 353; *Pierce v. Goddard*, 33 Id. 764. But property the value of which has been greatly enhanced by one acting under a belief of ownership or of proper authority belongs to him: *Wetherbee v. Green*, 22 Mich. 311, *per* Cooley, J.; *Lampton v. Preston*, 19 Am. Dec. 104; *Hyde v. Cookson*, 21 Barb. 92. A dividend earned but not declared prior to a transfer of stock, belongs to the owner of the stock when the dividend was actually declared, and not to the person who was owner of the stock prior to such declaration: *Brundage v. Brundage*, 1 T. & C. 82; S. C., 65 Barb. 397; S. C., 60 N. Y. 544. This subject is further treated in the notes to *Betts v. Lee*, 4 Am. Dec. 369, and *Baker v. Wheeler*, 24 Id. 86.

ARTICLE MANUFACTURED BELONGS TO OWNER OF PRINCIPAL MATERIALS. The rule laid down and applied in the principal case, that where the materials of several persons are combined into one article the property in the resulting thing is in the owner of the principal materials which go to make up the whole, is universally recognized. One who delivers raw material to a manufacturer to be manufactured is the owner of the raw material and of the article manufactured from it in all the stages of its progress up to the time of its completion and delivery to him in its finished state: *Babcock v. Gili*, 10 Johns. 287; *Hyde v. Cookson*, 21 Barb. 92; *Worth v. Northam*, 4 Ired. L. 102; and he may replevy it if sold by the manufacturer to other parties: *Eaton v. Munroe*, 52 Me. 63. Where yarn is delivered to be manufactured into cloth, the cloth made therefrom belongs to the owner of the yarn: *Eaton v. Lynde*,

15 Mass. 242. One who contracts to build a barn with another's timber on the latter's land has no property in the timber: *Gallup v. Josselyn*, 7 Vt. 334. The ownership of a picture painted to order is always in the person ordering, although the artist has a lien upon it for his services: *Wright v. O'Brien*, 5 Daly, 54. So where the article is to be constructed principally though not wholly out of the materials of the employer, it will belong to him during the course of construction: *Stephens v. Briggs*, 5 Pick. 177. An article repaired by the addition of repairer's materials, provided it remains substantially the same thing, belongs, together with the additional materials, to the owner of the original article. So a worn-out wagon which is repaired by the addition of materials of greater value than the wagon in its defective condition belongs nevertheless to the owner of the wagon, but the mechanic has his lien: *Gregory v. Stryker*, 2 Denio, 628. And in *Hyde v. Cookson*, 21 Barb. 92, it is laid down that a manufacturer can not be deprived of the enhanced value he has given to the property of another. On the other hand, when the manufacturer furnishes all or the principal part of the materials used in the construction of any commodity, the property is continually his until completed and delivered to his employer: *Gregory v. Stryker*, 2 Denio, 628. A builder of a vessel constructed with his own materials owns it until delivered: *Merritt v. Johnson*, 7 Johns. 473; S. C., 5 Am. Dec. 289. And this is so, although part payments are made on the contract during the construction of the vessel, and a stipulation exists that the person for whom the vessel is built and who makes the payments shall have a lien upon it for the amount: *People v. Commissioners of Taxes*, 58 N. Y. 242; *Andrews v. Durant*, 11 Id. 35. Cars manufactured principally from the materials of the manufacturer if burned before they are delivered are the loss of the manufacturer: *McConihe v. N. Y. etc. R. R. Co.*, 20 Id. 495. So railroad ties to be made from the maker's timber belong to him until delivered and accepted: *Stephens v. Santee*, 49 Id. 35. Another class of cases arise when property like grain, capable of being mingled with other like property, is delivered to be manufactured into flour. The question arises whether the raw material belongs to the original owner, and the contract is bailment, or whether it belongs to the manufacturer, and the contract is sale. Where the contract is that the raw material shall be returned in a manufactured state: *Foster v. Pettibone*, 7 Id. 433; or where the identical thing is to be restored, as under contract with a warehouseman: *Chase v. Washburn*, 1 Ohio St. 244; or where the same property, though in an altered form, is to be returned, the contract is one of bailment, and the property remains in the original owner: *Hurd v. West*, 7 Cow. 752; *Lonergan v. Stewart*, 55 Ill. 44. So where wheat is delivered to a miller to be manufactured into flour, upon a contract that for a certain number of bushels of wheat the quantity of flour made therefrom shall be forthcoming, the contract is bailment, and the owner retains his property in the wheat: *Mallory v. Willis*, 4 N. Y. 76; *Inglebright v. Hammond*, 19 Ohio, 337; *Slaughter v. Green*, 1 Rand. 3. In the latter case the miller was not held responsible when the grain was consumed by an accidental fire. But if the contract with the manufacturer is simply that he shall return a manufactured article of equal value with the raw material, the contract is sale, and the manufacturer, or the party to whom the property is delivered, becomes the debtor of the original owner of the raw material: *Foster v. Pettibone*, 7 N. Y. 433; *Lonergan v. Stewart*, 55 Ill. 44; likewise, if the contract is in the alternative that the same property or a commodity of equal value or of the same kind and quality shall be returned: *Hurd v. West*, 7 Cow. 752. A transfer of corn to a miller which was mingled with other corn of the miller's, upon a contract to deliver an equal quantity

of corn of like quality upon demand, was a sale: *South Australian Ins. Co. v. Randell*, L. R., 3 P. C., 101, 113. So a delivery of wheat to a miller to be exchanged for flour, or bran, or grain, as the original owner should elect, constitutes a sale which makes the miller a debtor: *Wilson v. Cooper*, 10 Iowa, 565; and if the grain is destroyed by fire, and the miller refuse to deliver the flour in payment for the grain received, the original owner of the wheat may maintain *assumpsit* against him: *Ewing v. French*, 1 Blackf. 353. See title "Confusion of Goods, below."

CHATTEL MORTGAGE OF UNFINISHED ARTICLES COVERS THEM WHEN COMPLETED, if the original article is still capable of identification: *Harding v. Coburn*, 12 Met. 333. A mortgage of leather cut and prepared for the manufacture of shoes covers the shoes when they are made from it by the mortgagor: *Putnam v. Cushing*, 10 Gray, 334. So where a rifle with a skeleton stock was fitted with a wooden stock, and a new lock was substituted: *Comins v. Newton*, 10 Allen, 518. An engine which was mortgaged and completed out of materials also mortgaged was covered by the mortgage in its complete state: *Jenckes v. Gaffe*, 1 R. I. 511. A mortgage of unfinished pruning-shears covered them when completed and greatly increased in value: *Perry v. Pettingill*, 33 N. H. 433. So a mortgage of cucumbers in bulk and in salt covers them when "greened" and put into bottles and vinegar. A lien by agreement placed on goods in an unfinished state, whether stipulated to cover them in their finished state, or not, will do so: *Dunning v. Stearns*, 9 Barb. 630; *Sumner v. Hamlet*, 12 Pick. 76. See also note to *Moody v. Wright*, 46 Am. Dec. 715, 716.

PROPERTY AFFIXED TO REALTY BECOMES PROPERTY OF OWNER OF REALTY BY ACCESSION.—This is the *constructio* or *inædificatio* of the Roman law. The Roman law writers always mention, as an example of the acquirement of title by accession, the case where one with another's materials builds on his own or another's land, or with his own materials builds on another's land. In such case the property went to the owner of the land on which it was built, for without the land which supported, and as it were maintained, the fixture, it could not exist. *Omne quod inædificatur solo cedit*: See 2 Colquhoun's Rom. Law, sec. 991; Ortolan's Rom. Law, sec. 394. Houses become a part of the realty when an intention to that effect is evidenced without regard to the foundation on which they stand: *Freeman v. Lynch*, 8 Neb. 192. And a building not firmly fixed to the realty, *Lipsky v. Bergman*, 52 Wis. 256; S. C., 38 Am. Rep. 735, but erected on posts and blocks by one in adverse possession, *Doscher v. Blackiston*, 7 Or. 143, belongs to the owner of the land. A house built partly with the builder's materials on another's land, under an agreement that upon payment of a specified sum by the builder the owner of the land will convey the house and land to him, is not the personalty of the builder, but is the property of the owner of the land: *Hutchins v. Shaw*, 6 Cush. 58. And as a general rule, a house built without any agreement that it shall remain personal property will be realty, and will belong to the owner of the land: *Aldrich v. Husband*, 131 Mass. 480. But an agreement between the parties that a building shall remain personal property is effectual: *Sagar v. Eckert*, 3 Ill. App. 412; *Ham v. Kendall*, 111 Mass. 297; *Hartwell v. Kelly*, 117 Id. 235; *Priestley v. Johnson*, 67 Mo. 632; *Rush County Commissioners v. Stubbs*, 25 Kan. 322; *Evans v. McLucas*, 15 S. C. 67. When a party consents to the erection of a building on his property with another's materials for another's use, disconnected from the use of the land, it will be the personal property of the builder: *Corwin v. Moorhead*, 43 Iowa, 466. Millstones placed in a mill may remain personal property under an agreement to that

effect, even against a subsequent owner of the mill: *Sullivan v. Jones*, 14 S. C. 362. A building not attached to real estate, as during its transit from one lot to another, is personal property: *Titus v. Maber*, 25 Ill. 257; *Salter v. Sample*, 71 Id. 430,

A mortgagee can not enforce his lien against buildings removed from the mortgaged premises and attached to another freehold: *Harris v. Bannon*, 78 Ky. 568; *Tomlinson v. Thompkins*, 27 Kan. 70. A building erected partly on the land of each of two adjoining owners may be removed by either only to the extent that it rests on his land: *Beers v. St. John*, 16 Conn. 322. Where a tenant for years tears down an old shop and builds a new one partly out of the old materials, the new shop does not vest in the owner of the former unless it is merely the old shop repaired or reconstructed. The title to the new shop turns upon the question whether it is substantially the same building or not: *Id.* Fence rails and stakes taken by a trespasser and built into a fence on his real estate become his property, and can not be replevied: *Ricketts v. Dorrell*, 55 Ind. 470; *State v. Graves*, 74 N. C. 396. But the owner may sue in *assumpsit* for the value of lumber tortiously built into the defendant's house: *Abbott v. Blossom*, 66 Barb. 353. In *Shoemaker v. Simpson*, 16 Kan. 43, it is held that an owner of personal property can not be deprived of it by its being attached to another's real estate by a third party if it can be removed without great inconvenience and injury. The owner of land does not acquire property in builder's materials until they are annexed to the freehold, and where a builder removed staging, it became subject to an execution against him: *Johnson v. Hunt*, 11 Wend. 135. It is the general rule that personal property, no matter who may be the owner, becomes the property of the owner of the land to which it is attached: *Fryatt v. Sullivan*, 7 Hill, 529; *Mathes v. Dobschuetz*, 72 Ill. 438; *Jenkins v. McCurdy*, 48 Wis. 628; S. C., 33 Am. Rep. 841; *Hannibal etc. R. R. Co. v. Crawford*, 68 Mo. 80. But coal or ore which has been mined under a lease and left in the mine or upon the land is personalty, and may be removed if this can be done without damage: *Lykens Valley Coal Co. v. Dock*, 62 Pa. St. 232; *Green v. Ashland Iron Co.*, Id. 97. The subject-matter of this head is, however, included in the law of fixtures, and will not be further treated here. The notes and cases in this series upon what are fixtures are collected in the note to *Makie v. Smith*, 52 Am. Dec. 617. Nor is it within the scope of this note to treat the law of betterments or the compensation for improvements allowed to one who has made them under a belief that he had title to the land.

CONFUSION OF GOODS is such a mixture of the goods of two or more persons that they can not be distinguished; Bouv. Law Dict.; 2 Kent's Com. 364; 2 Schouler on Per. Prop. 42; 2 Bla. Com. 405. And where the intermixture is such that the separate goods of each party can no longer be distinguished and the goods intermingled are of different qualities and values, the innocent party whose rights have been invaded will be entitled to the whole mass by accession. This is a rule of expediency. It is a case where the law confuses rights in order to resolve the confusion of goods, and the rule is therefore to be applied only where a just division and equitable partition of rights can not be made. Thus where an agent converts to his own use goods intrusted to his care, or misapplies them, the principal does not thereby acquire title to like goods of the agent, as in case of confusion; *Wood v. Fales*, 24 Pa. St. 246. Four cases may arise: 1. Where the mixture is made by consent of the parties; 2. Where it arises from the willful or tortious conduct of one of the parties; 3. Where it is made by unintentional mistake; 4. Where it is the result of inevitable accident or *vis major*.

MIXTURE MADE BY CONSENT OF PARTIES.—In such a case the relation of the parties is that of contract, and the presumption arises that they agreed to hold the mass as tenants in common. This was the rule of the civil law: 2 Kent's Com. 364. The case more frequently arises where several owners deposit grain in a warehouse, but exists wherever the goods of two or more parties are indistinguishably mingled by common consent; *Dole v. Olmstead*, 36 Ill. 150; *Warner v. Cushman*, 31 Id. 283; *Low v. Martin*, 18 Id. 286; *Adams v. Meyers*, 1 Saw. 306; *Nowlen v. Colt*, 6 Hill, 461; S. C., 41 Am. Dec. 756; *Lansing v. Stowell*, 37 How. Pr. 88; *Wilson v. Nason*, 4 Bosw. 155; *Buckley v. Gross*, 3 B. & S. 574. Being tenants in common, they are subject to stand their *pro rata* of loss accruing to the general property from decay or other causes, and one who has received from the warehouseman more than his share will be responsible to his co-owners for the surplus: *Warner v. Cushman*, 31 Ill. 283; *Dole v. Olmstead*, 36 Id. 150. Where one delivers wheat to a miller to be manufactured into flour and mingles it with the miller's wheat, he still retains property in the number of bushels he delivers: *Inglebright v. Hammond*, 19 Ohio 337. But where the contract with the miller is merely to deliver an equivalent in value for the grain, whether it be in the form of flour or bran, or in grain, although the grain is mingled with the miller's, the parties are not tenants in common, for the contract is a sale and the miller is a debtor: *Wilson v. Cooper*, 10 Iowa, 565; *South Australian Ins. Co. v. Randell*, L. R., 3 P. C., 101, 113. So where grain is delivered to a warehouseman upon the consideration that the money value of it at the time that a demand is made be paid: *Loneragan v. Stewart*, 55 Ill. 44. A contract where one party is to furnish lumber and the other to make shingles out of it, and to receive a certain quota of the shingles in payment for his labor, makes the parties tenants in common: *White v. Brooks*, 43 N. H. 402; see *supra*, title "Article Manufactured," etc. When there is a combination of materials of the same kind, quality, and value, as wine, oil, grain, and the like, it is held that a sale of a certain quantity of the mass, if otherwise complete, passes the title without distinct separation or identification of the particular particles sold. Thus a sale of ten tons of oil out of a cistern containing forty tons is complete, and passes the title without measuring out the ten tons sold: *Whitehouse v. Frost*, 12 East, 614. In a sale of a specified quantity of grain, wine, oil, or flour, its separation and identification from the mass, indistinguishable in quantity or value, is not necessary to pass the title: *Kimberly v. Patchin*, 19 N. Y. 330. In this case Comstock, J., said: "But as it is not possible in reason and philosophy to identify each constituent particle composing (such) a quantity, so the law does not require such an identification. Where the quantity and the general mass from which it is to be taken are specified, the subject of the contract is thus ascertained, and it becomes a possible result for the title to pass, if the sale is complete in all its other circumstances. An actual delivery, indeed, can not be made unless the whole is transferred to the possession of the purchaser, or unless the particular quantity sold is separated from the residue. But actual delivery is not indispensable in any case in order to pass a title if the thing to be delivered is ascertained, if the price is paid or credit given, and if nothing further remains to be done in regard to it:" Id. 333. In *Cushing v. Breed*, 14 Allen, 376, the same principle is maintained, but it was held that the seller and purchaser were tenants in common. Therefore, when persons have become tenants in common of personalty of the same quality and value, each may sever and appropriate his share, if it can be determined by measurement and weight, without the consent of the others, and sell or destroy it without being liable to them in an action for conversion. The identifica-

tion of the very grains of wheat which belong to each party is unnecessary: *Wilson v. Nason*, 4 Bosw. 155; *Tripp v. Riley*, 15 Barb. 333; *Fobes v. Shattuck*, 22 Id. 568; 2 Schouler on Per. Prop. 43. In *Low v. Martin*, 18 Ill. 286, it is held that a tenant in common of grain in a warehouse could not maintain replevin for the whole, but would have his proportionate share of the whole. A tenant in common of grain, who appropriates the whole, may be sued by the co-tenant for the conversion: *Lobdell v. Stowell*, 37 How. Pr. 88. *Morgan v. Gregg*, 46 Barb. 183, goes a step further than the majority of the cases, and discards altogether the theory of tenancy in common in the case of goods of equal quality and value, holding that the mere fact of the admixture of property does not necessarily produce it. Each owner may own in severalty his share of the goods so mingled, especially when the property is all of one kind and value, as barley. The reason of the arising of a tenancy in common is the loss of identity of the property belonging to each; but where the property is of the same kind and value, and the proportionate shares are known, the reason of the rule no longer exists: Id. In *Young v. Miles*, 20 Wis. 615, the plaintiff was the owner of a certain quantity of wheat, which with his consent was stored in mass with that of others in a warehouse. After shipments had been made from the mass, until a quantity not greater than that due him was left, this residue was held to be his absolute property as against the warehouseman, and any invasion of that quantity was a conversion, and plaintiff might follow the wheat wherever it could be identified.

This subject is discussed at considerable length in an article in 6 Am. Law Rev. 450-471, on "Grain Elevators." See also 2 Schouler on Per. Prop. 42-45.

WILLFUL AND TORTIOUS CONFUSION.—The civil law gave the whole property to the party who made the intermixture, but he remained liable in damages for the value of the goods taken to the party whose goods he had intermingled with his own: 2 Kent's Com. 364; Inst. 2, 1, 27, 28. Here is a manifest encouragement of fraud, and the common law went direct to the contrary and gave the whole property to him whose property was first invaded, without any compensation to the wrong-doer: 2 Kent's Com. 365. A person who voluntarily and willfully mixed his own money with another's by casting it among the other's money while at play lost his money altogether, because he could not distinguish the particular pieces: *Warde v. Aeyre*, 2 Bulst. 323; S. C., Cro. Jac. 366. The severity of this rule has been modified, and it is now the rule that even where the mixture is wrongful and fraudulent, yet if the mass is composed of parts which are of equal quality and value, and if the proportion of the whole which each party originally owned is known, the parties will be tenants in common, and each will be entitled to his proportion: *Hasseltine v. Stockwell*, 30 Me. 237; S. C., 50 Am. Dec. 627; *Robinson v. Holt*, 39 N. H. 557; *Adams v. Meyers*, 1 Saw. 306; *Brakely v. Tuttle*, 3 W. Va. 86; *Buckley v. Gross*, 3 B. & S. 574. But although the tenancy in common is conceded to exist here, the rights of the parties are by no means equal. Every intendment and presumption is against the wrong-doer. The burden of proof is upon him to establish his right, otherwise the innocent party, who is to be protected at all events, will take the whole of the inseparable mass. Thus one who has willfully confounded his goods with the goods of a stranger, though they be of the same kind, will lose the whole unless he can prove the true quantity belonging to himself: *Starr v. Winegar*, 3 Hun, 491. And where another has wrongfully confused goods, the innocent party has a perfect right to take out the proportion belonging to himself whether the other be willing or not: *Sims v. Glaazener*, 14 Ala. 695; S. C., 48 Am. Dec. 120; *Brakely v.*

Tuttle, 3 W. Va. 86. One who mixes another's coal with his own and sells the mass can not set up that the coal mixed with his own was of inferior quality and thus diminished the price obtained, but the innocent party is entitled to the full value of his coal: *Lord Rokeby v. Elliott*, L. R., 13 Ch. D., 277. The endeavor is to administer substantial justice, and the wrong-doer can obtain no advantage. Pork packed in barrels does not so lose its identity by being stored by a factor in a warehouse with other pork packed in the same manner and with the same brand as to allow the factor to substitute other pork for it after he has sold it: *Seymour v. Wyckoff*, 10 N. Y. 213; so in the case of wheat, if he sells it he will be liable for its value: *Chase v. Washburn*, 1 Ohio St. 244; see *Wood v. Fales*, 14 Pa. St. 246.

If the mixture is indistinguishable, and not capable of just appreciation and division according to the rights of each owner, or the articles mixed are of different qualities and values, and the original qualities and values can not be distinguished, the party whose fault or neglect causes the mixture must bear the whole loss, and the innocent party will take the whole by accession: *Robinson v. Holt*, 39 N. H. 557; *Hasseltine v. Stockwell*, 30 Me. 237; S. C., 50 Am. Dec. 627; *The Idaho*, 93 U. S. 575; *Alley v. Adams*, 44 Ala. 609; *Root v. Bonnema*, 22 Wis. 539. That part of the mass which he can identify and prove to be his own he may reclaim: *Lepton v. White*, 15 Ves. 432, 442; *Colwill v. Reeves*, 2 Camp. N. P. 575; *Frost v. Willard*, 9 Barb. 440; *Alley v. Adams*, 44 Ala. 609. And if damages are given to the innocent party, they will be the utmost value of his property: *Hart v. Ten Eyck*, 2 Johns. Ch. 62; *Brakenridge v. Holland*, 2 Blackf. 377; see *Lord Rokeby v. Elliott*, L. R., 13 Ch. D., 277. Where one willfully mixes his lumber with another's indistinguishably, the two lots being of different qualities and values, the injured party may replevy the whole lot: *Jenkins v. Steanka*, 19 Wis. 126; the party producing such confusion forfeits the whole, and his creditors can not attach the mass: *Beach v. Schmultz*, 20 Ill. 185; and in the case of saw-logs, if the party producing the confusion can not distinguish his own, he loses all: *Dillingham v. Smith*, 30 Me. 370; *Stephenson v. Little*, 10 Mich. 433. In the latter case, Campbell, J., dissenting, held that, as the evidence showed that the logs were of a uniform value per thousand feet, the wrong-doer was entitled to his proportion. Confessing his premises, his conclusions were undoubtedly law. A party having charge of another's property, and confounding it with his own, so that a mass of different qualities and values is produced, must distinguish his own property or lose it: *Brakenridge v. Holland*, 2 Blackf. 377; as in the case of a surviving partner continuing the firm business: *Diversey v. Johnson*, 93 Ill. 547; or where one has obtained junk by fraud and cast it among his own: *Jewett v. Dringer*, 30 N. J. Eq. 291. So a trustee who has mixed the trust funds with his own will be responsible for the interest thereon: *Cook v. Addison*, L. R., 7 Eq., 466. The factors of the plaintiffs sold plaintiffs' flour and some of their own and took notes in payment for the whole. They failed, and it was held that the property was not so mingled as not to enable plaintiffs to recover the value of their flour out of the sum paid on the two notes: *Beach v. Forsyth*, 14 Barb. 499. Where a bill is remitted to a factor to be converted into funds, and he mingles the bill with the property of others by taking a joint note covering that bill and other sums belonging to other parties, this being in accordance with general usage, the factor will not be responsible in case of the insolvency of the promisors on the joint note: *Hamilton v. Cunningham*, 2 Brock. 350. The innocent party is favored, for if he take more than his own property from a mass wrongfully confused, he is not a wrong-doer, unless the party con-

fusing pointed out his own and demanded them of him: *Smith v. Morrill*, 58 Me. 566. Whereas, when the wrong-doer seeks to recover his property from such a mass, he must first point out his own: *Loomis v. Green*, 7 Id. 386; *Seavy v. Dearborn*, 19 N. H. 351.

EXECUTIONS AND ATTACHMENTS.—Where goods of a debtor are mixed with those of another, but in such a way that they are distinguishable, it is the duty of the officer about to attach to make reasonable inquiries in order to distinguish them before he is justified in taking the goods of the other person: *Moore v. Bowman*, 47 N. H. 494, 501. But where the goods are mingled in an indistinguishable mass, and the officer is unable to distinguish them, and the one who has intermingled his goods with those of the debtor does not point out his own, the officer or creditor is justified in taking the whole: *Robinson v. Holt*, 39 Id. 557; *Shumway v. Rutter*, 8 Pick. 443; *Taylor v. Jones*, 42 N. H. 25; *Chappell v. Cox*, 18 Md. 513. But in *Treat v. Barber*, 7 Conn. 274, it was held that although the person intermingling refused to identify his property, yet the creditor would not be justified in taking the whole, unless the intermixture were fraudulent. When the creditor has taken the whole he may retain it until the goods which do not belong to the debtor are pointed out: *Taylor v. Jones*, 42 N. H. 25. A party who fraudulently confounds the goods of a debtor with his own, if such goods are attached, must identify his own property or lose it: *Weil v. Silverstone*, 6 Bush, 698. He has no action against the officer who takes the whole until he has pointed out his goods, demanded them, and been refused: *Smith v. Welch*, 10 Wis. 91. But if after his goods have been pointed out the officer sells them, it is a conversion: *Shumway v. Rutter*, 8 Pick. 443. When the owner can show title to a certain number of articles composing the mass, being unable to point out the particular subjects of his ownership, the officer is justified in selecting and delivering the least valuable articles: Id. Where two parties collude to intermix their goods to defraud the creditors of one of them, neither party can take any advantage from the intermixture: *McDowell v. Russell*, 37 Pa. St. 164. And see Freeman on Ex., secs. 254, 272; 2 Schouler on Per. Prop. 49, 50. Money, the proceeds of an execution sale, deposited at a banker's by a sheriff in his own name, loses its identity as a specific fund, and can not be followed into the hands of third parties, by those entitled to the proceeds of the sale: *Carlton v. Conroy*, 21 Cal. 170. Part of the money of two persons mingled in a safe in the possession of a third party, and seized by the sheriff under a claim against the latter, may be recovered in an action of replevin by one of the parties who was entitled to as much as was seized, and who pointed it out as his property at the time of the seizure: *Griffith v. Bogardus*, 14 Id. 410. When goods pledged for debt become confused with other goods of the debtor, the creditor's lien is lost if the confusion is created by the creditor: *McKean v. Wagenblast*, 2 Grant Cas. 462; and is extended to the whole mass, when the intermixture is caused by the owner: Id.; *Huff v. Earl*, 3 Ind. 306. And much the same principle is maintained in the case of mortgages: See *infra*. An execution debtor having sold the goods levied on, and substituted others, those substituted become subject to the levy: *Roth v. Wells*, 29 N. Y. 471. In *Holbrook v. Hyde*, 1 Vt. 286, it is said that property readily distinguishable, as cattle are, is not lost by intermixture.

INNOCENT OR MISTAKEN CONFUSION.—We have seen that where the confusion is of goods of different qualities and values the wrong-doer loses his property. There are cases which say that if the intermixture is innocent or by mistake, or even merely negligent, without the element of willfulness or fraud, the party causing the confusion will not lose his property: *Pratt v.*

Bryant, 20 Vt. 337; *Ryder v. Hathaway*, 21 Pick. 298. "And yet while the courts show an obvious disposition to shield the unintentional trespasser from loss, they are not as yet bold in declaring the parties owners in common of the entire intermixture, a consequence which would doubtless follow were the equities of the two precisely alike; notwithstanding, such must logically be the result, when all means of identification have failed:" Schouler on Prop. 48. The opinion of the learned author is worthy of weight; but it must be borne in mind that when one of two innocent parties is to suffer, the one whose negligence has caused the loss must bear it. And cases may easily be imagined where a delivery of the whole confused mass to the party whose property has been invaded would not compensate him for the invasion, and a division would work a positive injury to him. To take an example: suppose inferior wine or oil or sugar or wheat to be mixed with a far superior quality of the same commodity; giving the whole mixture to the owner of the superior quality, whose property has been invaded, might not recompense him for the cost of refining and segregating it where that could be done, or for the loss resulting from the sale of the heterogeneous mass. But it must be confessed that in the above examples, if you increase the quantity of the inferior quality to a sufficient extent, the converse of the conclusion drawn will result, that is, the innocent party will be more than compensated. The question then becomes one of expediency depending largely upon the equities of the parties and the practicability of any division between them, the leaning being against the party whose unintentional act or negligence has caused the confusion. The same principles existing in favor of willful wrong-doers will of course prevail in favor of unintentional confusers of goods. "If they [the property intermixed] were of equal value, as corn or wood, and of the same kind, the rule of justice would be obvious: let each one take his own given quantity. But if they were of unequal value, the rule would be more difficult. And if the intermixture was such as to destroy the property, the whole loss should fall on him whose carelessness, or folly, or misfortune caused the destruction of the whole:" *Ryder v. Hathaway*, 21 Pick. 305, 306; see *Ringgold v. Ringgold*, 1 Har. & G. 11. "If the innocent party use by mistake the property of another innocently mixed with his, or refuse to suffer the plaintiff to take it away, he is liable in trover; or if he have sold the property and received money for it, the plaintiff may waive the tort and sustain *assumpsit* for the money:" *Pratt v. Bryant*, 20 Vt. 337. Innocent intermingling does not justify creditors of the other party to attach the whole without requesting the party who has innocently caused the confusion to point out his own property: *Smith v. Sanborn*, 6 Gray, 134. Where the lumber of two persons is intermingled by trespassers, one of the parties may retake the whole from the trespassers or their privies without committing trespass: *Bryant v. Ware*, 30 Me. 295. One who unintentionally intermingled railroad ties of his own with those of another has no action against the latter for taking his proportion from the mass, though the latter took some of the ties which the plaintiff could distinguish as his own: *Chandler v. De Graff*, 25 Minn. 88. The rule of confusion does not apply to a case where a joint owner without any fraudulent intent obtains damages in gross for injuries done to the joint property and to his own separate property: *Thorne v. Colton*, 27 Iowa, 425. In replevin the plaintiff must distinguish his own property, though the defendant may have intermixed it with his own: *Ames v. Miss. Boom Co.*, 8 Minn. 467.

CONFUSION RESULTING FROM INEVITABLE ACCIDENT OR VIS MAJOR.—In this case the equities of the parties are equal. To the fault of neither can the

confusion be attributed. It follows that where indistinguishable confusion results, the original owners will become tenants in common of the mass, sharing proportionally the loss: The late case of *Spence v. Union Marine Ins. Co.*, L. R., 3 C. P., 427, was a case where bales of cotton had been shipped in a vessel which was wrecked. Some of the cotton was lost in this way. The rest was taken by another ship to port. The marks upon the bales saved were so obliterated as to render it impossible to distinguish one person's cotton from another's. The owners were held to be tenants in common of the bales saved, sharing the loss and expenses of salvage *pro rata*. *Jones v. Moore*, 4 You. & Coll. 351, was a case where oil leaking out of the casks in the course of shipment was collected. It was held to belong to the original owners of the oil as tenants in common. This principle has been recognized in the United States. Where a freshet floated wood of different owners into an indistinguishable mass, they became tenants in common, and the mere taking possession of the whole by one owner was not a conversion, but he held it subject to demand from the other owners for their interest: *Moore v. Erie R'y Co.*, 7 Lans. 39. The principle is recognized also in *Bryant v. Ware*, 30 Me. 298.

CONFUSION OF MORTGAGED GOODS.—A mortgage permitting the mortgagor to remain in possession and continue the business of buying and selling the goods is void as to creditors of the mortgagor: *Gardner v. McEwen*, 19 N. Y. 123; *Blakeslee v. Rossman*, 43 Wis. 116; *State v. Jacob*, 2 Mo. App. 183; *In re Bloom*, 17 Nat. Bank. Reg. 425. Whether such a permission on the part of the mortgagee necessarily makes the mortgage fraudulent, is a disputed question: See Jones on Chattel Mortgages, secs. 379–425, expounding the doctrines adopted by the courts of the several states. But at least the mortgagee will lose his lien on the goods sold, and it will not reattach to the new and substituted stock, though it be purchased with the proceeds of the mortgaged goods: *Rose v. Bevan*, 10 Md. 466; *Hamilton v. Rogers*, 8 Id. 301; *Davenport v. Foulke*, 68 Ind. 382; *Holly v. Brown*, 14 Conn. 255; *Barnard v. Eaton*, 2 Cush. 294; *Rhines v. Phelps*, 8 Ill. 455; *Webster v. Power*, L. R., 2 P. C., 69. In *Simmons v. Jenkins*, 76 Ill. 479, it is said that where the mortgagor, with the consent of the mortgagee, mingles by sale and purchase other goods indistinguishably with the mortgaged goods, the lien is not destroyed, but it will not avail against the liens of third persons. A mortgagee permitting the mortgagor to sell the mortgaged goods can not retake them from the purchasers: *Ogden v. Stewart*, 29 Ill. 122. In Maine, however, the substituted stock will be covered by the mortgage: *Abbott v. Goodwin*, 20 Me. 408; *Allen v. Goodnow*, 71 Id. 420; see *Davis v. Marx*, 55 Miss. 376. In Michigan a mortgage is not invalidated by a proviso permitting the sale of the mortgaged stock in the course of trade, but the lien does not attach to the new goods; though, if the mortgagor mingles the new goods with the old ones and refuses to identify them, the doctrine of confusion will apply: *People v. Bristol*, 35 Mich. 28. In the absence of evidence that the mortgaged stock was sold and the stock replenished with new goods, it will be presumed that the original stock remains: *Hudson v. Warner*, 2 Har. & G. 415. Where the mortgaged property is mingled with other property, and sales made from the mass, but the amount realized from the sale of the mortgaged property could be fairly determined, this amount represented the property sold as against other lienors: *Armstrong v. McAlpin*, 18 Ohio St. 184. The title to goods which the mortgagor has purchased with the money obtained from a sale of the mortgaged goods does not vest in the mortgagee, unless made to repair or replenish the mortgaged property: *Holly v. Brown*, 14 Conn. 255. When

the mortgaged property is commingled with that subsequently acquired, it is presumed to be done with the mortgagee's permission; and if it be indistinguishably intermixed, third parties' rights can not be affected: *Hamilton v. Rogers*, 8 Md. 301. Mortgaged goods moved from one store to another are not relieved from the lien, though it may be difficult to identify them: *Wheelden v. Wilson*, 44 Me. 1. A mortgagor who purposely or through want of proper care intermingles the mortgaged goods with his own loses his property against the mortgagee, who may claim the whole against the mortgagor and his consignees: *Willard v. Rice*, 11 Met. 493; S. C., 45 Am. Dec. 226; *Merchants' Nat. Bank v. McLaughlin*, 1 McCrary, 258; S. C., 2 Fed. Rep. 128; *Simmons v. Jenkins*, 76 Ill. 479. And he may replevy the whole from a purchaser, in the absence of evidence to distinguish the particular goods covered by the mortgage: *Adams v. Wildes*, 107 Mass. 123; *Kreutzer v. Cooney*, 45 Md. 582. And when he takes the goods of another, who has confused them with the mortgaged property and refuses to separate them, he is not a trespasser: *Fuller v. Paige*, 26 Ill. 358; and see analogous instances cited under "Executions and Attachments," *supra*. A mortgage of cucumbers in bulk and in salt covers them when "greened" and put into bottles and vinegar. They are not so substantially changed and intermixed as to authorize an officer who attaches and sells them to retain the proceeds of the sale from the mortgagee: *Crosby v. Baker*, 6 Allen, 295. So where a mortgagor of a vessel removes the old sails and substitutes new ones, the new sails will be covered by the mortgage, as this is ordinary repairs, and a purchaser under the mortgage will acquire the new sails: *Southworth v. Isham*, 3 Sandf. 448. In *Chisholm v. Chittenden*, 45 Ga. 213, it is held that under the Georgia code a mortgage of goods can not by subsequent addition and intermixture of new goods be made to cover goods to a greater amount in value. See *Aderson v. Howard*, 49 Id. 313; *Goodrich v. Williams*, 50 Id. 425. In *Harding v. Coburn*, 12 Met. 333, 342, it is held that the rule requiring the owner of chattels, which he suffers to be intermingled with those of another, to point them out and demand them of an officer who has seized the whole as the property of the latter, before suing the officer, does not apply to a mortgagee of chattels which remain in the possession of the mortgagor, the mortgage embracing by its terms all other personalty which the mortgagor might put on the premises in place of those which he should sell, notwithstanding the latter clause is inoperative. But if the mortgagee does not point out the mortgaged goods which he has permitted to be intermingled by the mortgagor, an officer having a writ or execution against the latter will be justified in seizing and selling the whole as the debtor's property: *Robinson v. Holt*, 39 N. H. 557; see *Mowry v. White*, 21 Wis. 417, and "Executions and Attachments," *supra*. See, on intermingling of mortgaged goods, Jones on Chattel Mortgages, secs. 155, 481-483. See also "Chattel Mortgage of Unfinished Articles," *supra*. The subject is also noticed incidentally in the note to *Moody v. Wright*, 46 Am. Dec. 715, 716.

GENERAL PRINCIPLES OF CONFUSION OF GOODS.—The conclusions deduced from a consideration of the cases on confusion of goods are these: When the confusion is made by the consent of the parties, they will be tenants in common of the resulting compound; and if the mixture is composed of ingredients of the same kind, quality, and value, each may remove his proportion of the combined materials at will. When the mixture is made by a wrong-doer, but is composed of materials of the same kind, quality, and value, still the owners are tenants in common and each privileged to remove his proportion; but in case of conflicting rights, the court leaning to the protection of the innocent

party. Where the confusion is made by a wrong-doer and the component parts are of different qualities and values, still he will not lose his goods if he can point them out, and may recover those which he can identify, the burden of proof and the protection of his own rights resting upon himself. But where the confusion is of articles of different qualities and values, intermingled in an indistinguishable mass, the wrong-doer being unable to point out his own goods will lose them, and the innocent party whose rights have been invaded will acquire them by accession. And in this respect, if the intermixture has been caused innocently and through mistake, we can discover nothing more than an inclination of the courts to protect, as far as possible, the party whose misfortune, and not premeditated design, has caused the indistinguishable intermixture of articles of different qualities and values. No case has been found which declares that the party whose inadvertency has caused the confusion shall nevertheless become a tenant in common of the mixture. But where such an intermixture is caused by inevitable accident or *vis major*, the only equitable solution must be that the parties become tenants in common, as in the case where all consent.

3. MIXED ACCESSION.—The crops produced from land belong to the one who is lawfully in possession of the land: *Reilly v. Ringland*, 39 Iowa, 106. Crops sowed upon land by a stranger to the title, and without authority or consent of the owner, belong to the owner of the soil: *Freeman v. McLennan*, 26 Kan. 151. The growth of cuttings from plants and shrubs which have been mortgaged pass to the mortgagee by accession: *Bryant v. Pennell*, 61 Me. 108. Fruit trees are a part of the freehold: *Adams v. Smith*, 1 Ill. 221. The mere fact of the boughs or limbs of a tree planted upon the land of one person overhanging the land of another does not give the latter any right or title to any part of the tree or to the overhanging branches, or to the fruit growing upon them; and if the owner of the land which is overhung by the branches attempt by violence to prevent the owner of the adjacent lot upon which the tree grows from picking the fruit which overhangs, he is a wrong-doer, and liable to an action for assault and battery: *Hoffman v. Armstrong*, 46 Barb. 337. The owner of land may lawfully contract for its cultivation by another party, and provide in whom the ownership of the product shall vest: *Andrew v. Newcomb*, 32 N. Y. 417; *Fiquet v. Allison*, 12 Mich. 328. Straw is a part of the crop raised on a farm let on shares, and does not belong to the farm: *Nobbs v. Shattuck*, 22 Barb. 568.

PIKE v. McDONALD.

[32 MAINE, 418.]

CONTRACT BECOMES MERGED IN AND EXTINGUISHED BY JUDGMENT OBTAINED THEREON.

JUDGMENT OBTAINED SINCE FILING OF PETITION IN BANKRUPTCY on promissory note which might have been proved in bankruptcy is not barred by the discharge in bankruptcy, as it is a debt accruing since the petition. **SURETY HAVING SATISFIED JUDGMENT WHICH HIS PRINCIPAL WAS LEGALLY BOUND TO PAY** is entitled to recover judgment against him.

ASSUMPSIT by Pike against McDonald and others for money paid. It was agreed to submit the case to this court for disposition by nonsuit or default. The opinion states the case.

Shepley and Dana, for the plaintiff.

Swasey, for the defendants.

By Court, SHEPLEY, C. J. It appears by the agreed statement that Simeon Pease recovered judgment against the plaintiff and defendants in June, 1843, founded upon a promissory note made by them on October 1, 1839, on which the plaintiff was surety for the defendants.

One of the defendants, John E. McDonald, filed his petition to be declared a bankrupt on February 22, 1843, and such proceedings were had thereon that he obtained his discharge as a bankrupt on February 17, 1846.

The promissory note made to Pease might have been proved against John E. McDonald in bankruptcy, but instead of presenting his bankruptcy to prevent a recovery against him by Pease, he suffered that judgment to be recovered.

The promissory note became merged in and extinguished by the judgment, which became a new debt accruing since the petition in bankruptcy was filed, and not provable in bankruptcy, as decided in the case of *Holbrook v. Foss*, 27 Me. 441.

That judgment, being a debt which the defendant John E. McDonald was legally bound to pay, has been satisfied by the plaintiff as surety for the defendants, and he is therefore entitled to recover a judgment against John E. McDonald, as well as against the other defendant.

Defendants defaulted.

HOWARD, J., being of counsel for one of the parties, did not participate in the decision.

DISCHARGE IN BANKRUPTCY, HOW AFFECTS JUDGMENT RECOVERED AFTER PETITION FILED but before discharge on a debt which would have been barred by the discharge: See *Clark v. Rowling*, 53 Am. Dec. 290, and note, stating the weight of authority to be in favor of holding the discharge a bar to such judgment. The principal case is cited in *In re Mansfield*, 6 Nat. Bank. Reg. 393, to the point that such a debt is merged in the judgment, which is not barred by the discharge. In *In re Gallison*, 5 Id. 354, the court says, citing the principal case: "In Maine and Massachusetts it has been held that the judgment merges the original debt, and can not be proved in the bankruptcy, and will not be affected by the certificate."

DEBT IS MERGED IN JUDGMENT OBTAINED THEREON: See *Napier v. Gidiere*, 40 Am. Dec. 613, and note, citing prior cases.

SURETY HAVING PAID PRINCIPAL'S DEBT IS ENTITLED TO RECOVER JUDGMENT AGAINST HIM: See *Ward v. Henry*, 13 Am. Dec. 119; *Hunt v. Amidon*, 40 Id. 283. But actual payment need not be made before surety can maintain an action: *Polk v. Gallant*, 34 Id. 410. Surety indemnified by a mortgage has no right of action until damnified: *Hall v. Cushman*, 43 Id. 562.

Surety who pays the judgment obtained against himself and his principal thereby satisfies it and reduces himself to the situation of a simple contract creditor of such principal: *Briley v. Sugg*, 30 Id. 172. Surety having satisfied a judgment against his principal is substituted by operation of law to the rights of the creditor: *Fleming v. Beaver*, 19 Id. 629; *Creager v. Brangle*, 9 Id. 516; *Williams v. Tipton*, 42 Id. 420.

McLELLAN v. LONGFELLOW AND TRUSTEE.

[32 MAINE, 494.]

ATTORNEYS, COUNSELORS, AND SOLICITORS ARE NOT PERMITTED TO DIVULGE, without the assent of their clients, communications made to them in reference to their professional employment.

COMMUNICATIONS TO ATTORNEYS ARE PROTECTED, THOUGH MADE UNDER NO SPECIAL INJUNCTION OF SECRECY, and though the client do not understand the extent of the privilege.

COMMUNICATIONS TO ATTORNEYS ARE PROTECTED WHEN MADE WITH A VIEW TO PROFESSIONAL EMPLOYMENT, and in reference to such employment in legal proceedings pending or contemplated, or in any other legitimate professional services wherein professional advice or aid is sought.

CLIENT MAY WAIVE PRIVILEGE PROTECTING FROM DISCLOSURE COMMUNICATIONS MADE TO HIS ATTORNEY.

JUSTICE DOES NOT REQUIRE THAT COURT SHOULD OPEN CASE for re-examination and decision, under the Maine statute, when the only exceptions sustained are those taken to the admission of evidence which, when excluded, leaves sufficient evidence, in the opinion of the court, to sustain the judgment.

TRUSTEE disclosure. The opinion states the case.

Merrill, for the plaintiff.

Gilbert, for the trustee.

By Court, HOWARD, J. The supposed trustee presents this case upon exceptions to the rulings and decision of the judge of the district court, and insists that the whole matter as to his liability, embracing fact and law, may be re-examined and determined by this court. This may be done "when in the discretion of the court justice shall require it:" Stat. 1849, c. 117, sec. 2.

Upon an examination of the disclosure, and other proof introduced in the district court, under the provisions of the revised statutes, c. 119, sec. 33, and amendment, 1842, c. 31, sec. 15, we are satisfied that justice does not require that the exceptions should be sustained, so far as to open a case for re-examination and decision.

The testimony of *Merrill*, an attorney and counselor at law,

was received and considered by the judge of the district court, in forming his decision, as stated in the exceptions. It appeared, that the parties resided in Bath, where Merrill was in the practice of law. He states in his disposition, that the defendant, "Hannibal Longfellow, came into my office in said Bath, and said to me, that he was going to make a sale of his interest in the Sagadahock ferry, and his furniture in his house, to John B. Glass, and wanted me to draw a bill of sale of the same, that he was somewhat embarrassed, and he did not know but they might be attached, that he and said Glass should agree upon the terms before coming into my office, and that they should hold no conversation in my hearing in relation to it, so that I could not be made a witness against them. That afterwards, on the same day, said Longfellow came into my office, with said Glass, and requested me to make the bill or bills of sale, which I did as requested. That while drawing said bill or bills of sale I inquired of said Longfellow and Glass as to the terms to be inserted, on which said Longfellow took said Glass aside at two different times, once into the entry of said office, and once to a distant part of said office, and talked with said Glass in a low tone of voice, which conversation said deponent did not hear, but said Longfellow returned at each time after said private conversation and gave directions in presence of said Glass, as to the terms to be inserted, which was done according to his directions; that said deponent had reason to believe from the circumstances that said conversations was relative to said sale." There were other portions of the deposition not material to the point now under consideration.

It is contended that these statements of the witness reveal a part of the professional intercourse between client and attorney, which should not be disclosed by the latter.

Attorneys, counsel, and solicitors are not at liberty to divulge communications made to them, in reference to their professional employment. The law will not compel them to make the disclosure, nor will courts permit it to be made without the assent of their clients.

To entitle a communication to this privilege, it is not essential that it should be made under any special injunction of secrecy, or that the client should understand the extent of the privilege. But if it be made with a view to professional employment, and in reference to such employment in legal proceedings pending or contemplated, or in any other legitimate professional services, wherein professional advice or aid is sought

respecting the rights, duties, or liabilities of the client, it will fall within the privilege, and can not be disclosed by counsel. This, however, is a rule of law for the protection of the client, which he is at liberty to waive: *Bull. N. P.* 284; *Cromack v. Heathcoate*, 2 Brod. & B. 4; *Shellard v. Harris*, 5 Car. & P. 592; *Greenough v. Gaskell*, 1 Myl. & K. 98; Story's Eq. Pl., sec. 600; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528, 592-600 [49 Am. Dec. 189]; *Parker v. Carter*, 4 Munf. 273 [6 Am. Dec. 513]; *Foster v. Hall*, 12 Pick. 89 [22 Am. Dec. 400]; *Aiken v. Kilburne*, 27 Me. 263; 1 Phill. Ev. 131; 1 Greenl. Ev., sec. 240.

In *Hatton v. Robinson*, 14 Pick. 424 [25 Am. Dec. 415], it was held that the communication was not privileged, because it was made without any particular assignable motive, or in order to satisfy the attorney upon a point of fact, and not for the purpose of obtaining professional information. But in this case such was not the character or object of the communications to the counsel.

We can have no doubt that these disclosures were made to the attorney in reference to his professional employment, sought and obtained in the line of his profession, and that they would not have been made to him but for such employment. They constitute a part of the professional intercourse between the defendant and his attorney, which the latter could not properly reveal.

But excluding the testimony of the attorney, there will still remain evidence sufficient, in the opinion of the court, to show that Glass had in his possession goods and effects of the principal defendant, which he holds under a conveyance that is not *bona fide*, but fraudulent as to creditors of the defendant. Under the provisions of the revised statutes, c. 119, sec. 69, he is chargeable as trustee: *Page v. Smith*, 25 Me. 256.

The exceptions, though sustained in reference to the ruling of the judge of the district court respecting the testimony of the attorney, in other respects must be overruled, and the judgment below is affirmed.

COMMUNICATIONS TO ATTORNEY WITH RESPECT TO PROFESSIONAL EMPLOYMENT ARE PRIVILEGED unless the protection is waived by the client: *Crisler v. Garland*, 49 Am. Dec. 49; *Bank of Utica v. Mersereau*, Id. 189, and note 233, citing prior cases.

ERROR CAUSING NO INJURY, NO CAUSE FOR REVERSAL: See *People v. Cunningham*, 43 Am. Dec. 709; *Miles v. Stephens*, 45 Id. 621; *Gilpin v. Howell*, Id. 720, and cases cited in the notes.

DENNETT, PETITIONER.

[32 MAINE, 508.]

POWERS OF GOVERNMENT ARE DIVIDED BY CONSTITUTION INTO THREE DISTINCT DEPARTMENTS, and no person belonging to one of these can exercise any of the powers properly belonging to either of the others, except in cases expressly directed or permitted.

MANDAMUS CAN BE ISSUED BY SUPREME JUDICIAL COURT OF MAINE only to courts of inferior jurisdiction, to corporations, and to individuals.

CORRECTNESS OF PERFORMANCE OF OFFICIAL DUTY IMPOSED BY LAW UPON EXECUTIVE DEPARTMENT, of opening and comparing votes returned, is not a subject for judicial inquiry.

PERFORMANCE OF DUTY INTRUSTED TO EXECUTIVE DEPARTMENT OF GOVERNMENT TO NOMINEE is an official act of that department, and not the individual act of the persons holding office, notwithstanding other persons might lawfully have performed the same acts, if performance had been by law intrusted to them.

DUTY DEVOLVED UPON EXECUTIVE DEPARTMENT IS PERFORMED BY INCUMBENTS, upon the responsibility of their official stations and under the sanctity of their official oaths, and the judicial department can not interfere with these official acts by *mandamus*.

PETITION for *mandamus*. The opinion states the case.

H. W. Paine, for the petitioner.

By Court, SHEPLEY, C. J. This is a petition to the court, that a rule may issue, that the governor and council and secretary of the state may show cause why a writ of *mandamus* should not issue commanding the governor and council to declare the petitioner elected to the office of county commissioner for the county of Lincoln.

If such a writ can not be legally issued by the court, the rule to show cause should not be made.

By the constitution the powers of the government are divided into three distinct departments, and no person belonging to one of these can exercise any of the powers properly belonging to either of the others, except in cases expressly directed or permitted.

The authority conferred upon this court to issue writs of *mandamus* is limited to the issue of such writs to courts of inferior jurisdiction, to corporations, and to individuals.

The act approved on February 22, 1842, c. 3, sec. 2, provides, that "the governor and council shall open and compare the votes returned, as specified in the first section of this act." It is by such comparison of the votes returned for each candidate that the fact is ascertained that some person has or has not been elected to the office of county commissioner.

If the act of opening and comparing the votes returned be an official duty to be performed by the executive department, this court can not entertain the inquiry whether it has been correctly or incorrectly performed. That department is responsible for the correct performance of its duties in the manner prescribed by the constitution, but is not responsible to the judicial department.

The argument that it can not properly be regarded as an official duty of the executive department, because its performance might by law have been intrusted to other persons, is not regarded as sound. The performance of the duty might have been intrusted to others, and it might have been intrusted to the judicial department. It does not follow that an act can not be the official act of a department of the government because other persons might lawfully have performed the same acts, if performance had been by law intrusted to them.

This court has been authorized to lay out highways; and it could do so only as a court and in the exercise of its official duties; and yet other persons might have been authorized to perform those duties. Money is granted and works are directed to be performed by law under the direction of the president of the United States or of a governor of a state. In such cases the law might have intrusted the supervision to other persons. This duty is not necessarily to be performed by an executive department of the government by any provision of the constitution. When the performance is by law intrusted to an executive department of a government *eo nomine*, the performance of the duty is an official act. The individual or persons composing the executive department can not perform the act without being clothed with the official authority.

The act of opening and comparing the votes returned for county commissioners can not be performed by the persons holding the offices of governor and of councilors, unless they act in their official capacities, for it is only in that capacity that the power is conferred upon them. The duty is to be performed upon the responsibility of their official stations and under the sanctity of their official oaths. The governor and council, and not certain persons that may be ascertained to hold those offices, must determine the number of votes returned for each person as county commissioner, and ascertain that some one has or has not a sufficient number to elect him.

The case of *Marbury v. Madison*, 1 Cranch, 137, does not ap-

pear to be opposed to these positions. The opinion in that case states, that "the province of the court is solely to decide on the rights of individuals, not to inquire how the executive or executive officers perform duties, in which they have a discretion. Questions in their nature political, or which are by the constitution and laws submitted to the executive, can never be made in this court." All interference with the executive department of the government is in that case expressly disclaimed.

If the individuals constituting the governor and council could be considered as acting, while opening and comparing the votes returned, in their individual and not in their official capacities, the rule prayed for should not be made, for an election of governor and of councilors has been declared since the act complained of was performed, and all the individuals composing the council are not the same as they were when the act was performed.

The application is for a *mandamus* to the governor and council, and not to individual persons.

The secretary of state could not be required to notify any person, that he had been elected to the office of county commissioner, until the governor and council had determined that he had a sufficient number of votes to elect him.

Rule denied.

THREE DEPARTMENTS OF GOVERNMENT ARE SEPARATE AND DISTINCT: See *De Chastellux v. Fairchild*, 53 Am. Dec. 570, citing prior cases in this series.

MANDAMUS LIES WHERE THERE IS CLEAR LEGAL RIGHT and no other remedy to enforce it: *Reading v. Commonwealth*, 51 Am. Dec. 534, and note. It is the appropriate remedy to compel public functionaries or tribunals to perform some duty required by law where the party has no other remedy; but the right or duty must be certain, or it will not lie: *Board of Police of Attala County v. Grant*, 47 Id. 102, and note. It is not the proper remedy to try title to office: 45 Id. 355, and note citing prior cases.

GOVERNOR, IN EXERCISE OF DISCRETIONARY POWERS, IS INDEPENDENT OF JUDICIARY: *Hawkins v. Governor*, 33 Am. Dec. 346, and note 361. In *Sutherland v. Governor*, 29 Mich. 331, citing the principal case, the court declined to issue *mandamus* to compel the governor to execute a ministerial duty for lack of jurisdiction to interfere with the governor's discretion, distinguishing between the governor as being himself a distinct and independent department of the government, and those administrative officers who, though clothed with important powers, are subject, in the performance of their duties, to the regulation and control of the legislature, the executive, or the judiciary, as the case may be.

BASSETT v. CARLETON.

[32 MAINE, 553.]

IF STATUTE CONFER SPECIAL PRIVILEGES, AND PROVIDE PARTICULAR REMEDY for their invasion, those neglecting that remedy may be without redress for the invasion.

EVIDENCE UPON INJURIES FOR REDRESS OF WHICH STATUTE HAS PROVIDED another tribunal is incompetent in an action at law to recover damages for such injuries.

SPECIAL TRIBUNAL CONSTITUTED BY CHARTER OF PRIVATE CORPORATION, for redress of certain injuries resulting from failure of the corporation to perform its duties, need not be consulted before bringing an action at law for injuries over which the charter has given it no jurisdiction.

CASE SHOULD NOT BE SENT BACK TO JURY, by supreme judicial court of Maine, on a point not raised at the trial, and to hear evidence to the introduction of which no objection was offered at the trial, and when perhaps no such evidence exists.

ACTION for damages on three grounds: that defendant's sluice was insufficient; that defendant did not seasonably turn the plaintiff's logs over the dam; and that defendant did not furnish sufficient water for the driving of the logs. The case is stated in the opinion. The case was submitted to this court for determination of the questions whether the evidence mentioned in the opinion was admissible, and whether it was requisite for the plaintiff to submit to the selectmen of Troy the sufficiency of defendant's sluice.

Lancaster, for the plaintiff.

Bradbury, for the defendant.

By Court, HOWARD, J. The defendant had erected and maintained a dam and sluice on the Carleton stream, in Troy, upon his own land, under a charter from the state, to improve the stream for running logs and other lumber. He was authorized to receive and recover a certain rate of toll for the passage of such lumber, and made liable to pay all damages that any person might sustain, by any failure, on his part, to construct and maintain the dam of the required height and capacity, or to erect and maintain a suitable and convenient sluice. Before any person could be entitled to the benefit of the sluice for floating lumber, he was required to pay the owner of the dam and sluice toll, as provided by the act: Stat. 1848, c. 185, secs. 1-4.

The fifth section of the act contains a provision, that "persons driving logs shall be entitled to sufficient water to drive their logs to the twenty-five-mile pond, so called, but said Carleton

shall not be obliged to turn logs through said sluice, unless there is a considerable proportion of the logs above ready to be turned over; and in case there arises any dispute between the owners of said sluice and the log owners, as to the time of turning over logs, the quantity to be turned over, or the amount of water to be let through to drive the same out, the selectmen of the town of Troy shall decide between the disputants, and may appoint one of their number to superintend the execution of their decree, and all parties interested shall be held to pay the expenses of said selectmen."

No question is raised as to the sufficiency of the dam, or the right to receive toll.

The selectmen of Troy for the time were constituted a tribunal to determine upon the spot when and in what quantity the logs were to be turned over the dam, and the amount of water to be let through to drive them to the pond. They had exclusive jurisdiction over the subject, and were to exercise that jurisdiction, upon the immediate occasion, on application of either of the parties if they disagreed.

If the plaintiff had required more seasonable action on the part of the defendant, or more water than he was willing to furnish, the decree of the selectmen might have settled that controversy or dispute, by removing the cause and preventing damages. If the plaintiff has neglected his rights and his duty in this respect, he can not recover damages which are the result wholly or in part of his own neglect. So if a statute confer special privileges, and provide a particular remedy for their invasion, those neglecting that remedy may be without redress for the invasion.

It was not competent for the plaintiff to introduce evidence on the points raised at the trial; which were: 1. Whether sufficient water had or not been furnished to drive the logs; and, 2. Whether the logs had or not been seasonably turned over the dam.

The selectmen of Troy had no jurisdiction conferred upon them, by the act referred to, respecting the sufficiency of the sluice, and the plaintiff was not required to submit that matter to their consideration, as a preliminary proceeding, or to obtain their decision upon any other matter of controversy in order to support an action for damages for the insufficiency of the sluice.

But as no question was made respecting the sufficiency of the sluice, the case should not be sent back to a jury on a point

not raised, and to hear evidence, to the introduction of which no objection was offered at the trial, and when, perhaps, no such evidence exists. To dispose of the case in that manner would seem to be oppressive to the defendant, and without any apparent benefit to the plaintiff.

Plaintiff nonsuit.

STATUTE PROVIDING REMEDY FOR MATTER BEFORE ACTIONABLE AT COMMON LAW is cumulative merely, and does not remove the common-law remedy: *Donnell v. Jones*, 48 Am. Dec. 59, and note citing prior cases. In *State of California v. Poulterer*, 16 Cal. 526, the principal case is cited as not contrary to this principle.

STATUTE CONFERRING NEW AND SPECIAL PRIVILEGES AND PROVIDING SPECIAL REMEDY for their invasion supplants the common-law remedy: *Call- ing v. Baldwin*, 21 Am. Dec. 168. The principal case is cited as authority on this point in *Wiley v. Starbuck*, 44 Ind. 316; *State v. Bittinger*, 55 Mo. 599; *First Nat. Bank v. Lamb*, 57 Barb. 434.

SMITH v. STATE.

[33 MAINE, 48.]

WHERE DEATH ENSUES IN PURSUIT OF UNLAWFUL DESIGN, without any intention to kill, it will be either murder or manslaughter as the intended offense is felony or only a misdemeanor.

PERFORMING OPERATION UPON PREGNANT WOMAN BY HER CONSENT, for the purpose of procuring an abortion, was no offense at common law, unless the woman was quick with child. But by the statute of Maine, it is made equally criminal to produce an abortion before and after quickening, and an unsuccessful attempt to cause the destruction of an unborn child is a crime, whether the child be quick or not.

TERM "FELONY" INCLUDES EVERY OFFENSE PUNISHABLE WITH DEATH or by imprisonment in the state prison.

EMPLOYMENT OF ANY INSTRUMENT WITH INTENT TO DESTROY CHILD of which a woman is pregnant, and the destruction of such child, constitute a felony. And if the death of the mother be occasioned by the use of such instrument with such intent, the offense is murder.

EMPLOYING MEANS WITH INTENT TO PROCURE MISCARRIAGE of a pregnant woman, and the procuring of the miscarriage thereby, constitute a misdemeanor, and if the death of the mother be occasioned by the employment of such means with such intent, the offense will be manslaughter.

INDICTMENT for murder. The facts are stated in the opinion.

Clifford, for the plaintiff in error.

Tallman, attorney general, for the state.

By Court, TENNEY, J. The record shows that the jury found a verdict of guilty of murder in the second degree against the prisoner upon the third count of the indictment. Thereupon

judgment was rendered, and sentence, that he be punished by confinement to hard labor for the term of his natural life, in the state prison, was pronounced.

The seventeenth, eighteenth, and nineteenth causes of error assigned are, that the charge in the third count of the indictment is manslaughter, and not murder in the second degree, and that the judgment and sentence thereupon are erroneous.

The third count in the indictment charges the prisoner with having feloniously, willfully, knowingly, maliciously, and inhumanly forced and thrust a wire up into the womb and body of one Beringera D. Caswell, she being then pregnant and quick with child, with a wicked and malicious and felonious intent to cause and procure her to miscarry and bring forth a child, of which she was then pregnant and quick.

And it is charged that by means of forcing and thrusting the said wire into her womb and body, she did bring forth the said child of which she was pregnant and quick, dead. And it is further charged that by the forcing and thrusting of the said wire by the defendant into her womb and body she afterwards became sickened and distempered in her body, and by the same means so used she suffered and languished, and afterwards by reason thereof she died. And it is averred, in the same count of the indictment, that the defendant, in manner and form as aforesaid, feloniously, wickedly, and of his malice aforethought, did kill and murder, contrary to the form of the statute, etc.

It is important to decide, whether in this count the prisoner is directly accused of having inflicted violence upon the mother, and thereby caused her death, or whether in putting into execution an unlawful design death took place collaterally, or beside the principal intention.

If medicine is given to a female to procure an abortion, which kills her; the party administering it will be guilty of her murder: 2 Ch. Crim. L. 729; 1 Hale P. C. 429. This is upon the ground that the party making such an attempt with or without the consent of the female is guilty of murder, the act being done without lawful purpose and dangerous to life, and malice will be imputed: *Commonwealth v. Parker*, 9 Met. 263 [43 Am. Dec. 396]; 1 Russ. on Cr. 454.

When death ensues in the pursuit of an unlawful design, without any intention to kill, it will be either murder or manslaughter as the intended offense is felony or only a misdemeanor: Foster, 268. Thus if a man shoot at poultry of another, with intent merely to kill them, which is only a tres-

pass, and slay a man by accident, it will be manslaughter; but if he intended to steal them when dead, which is felony, he will be guilty of murder: *Rex v. Plummer*, Kel. 117; 2 Ch. Crim. L. 729.

At common law, it was no offense to perform an operation upon a pregnant woman by her consent, for the purpose of procuring an abortion, and thereby succeed in the intention, unless the woman was "quick with child:" *Commonwealth v. Bangs*, 9 Mass. 387; *Commonwealth v. Parker*, before cited. And under the ancient common law, if a woman be "quick with child" and by a potion or otherwise killeth it in her womb; or if a man beat her, whereby the child dieth in her body, and she be delivered of a dead child, this is a great misprision, but no murder:" 3 Inst. 50. In both these instances the acts may be those of the mother herself, and they are criminal only as they are intended to affect injuriously and do so affect the unborn child. If before the mother had become sensible of its motion in the womb, it was not a crime; if afterwards, when it was considered by the common law that the child had a separate and independent existence, it was held highly criminal.

Similar acts with similar intentions by another than the mother were precisely alike, criminal or otherwise, according as they were done before or after quickening, there being in neither the least intention of taking the life of the mother. If in the performance of these operations and with these designs an abortion took place, and in consequence of the abortion the mother became sick and death thereupon followed, it was not murder, because the death was collateral, and aside of the principal design, and success in the principal design did not constitute a felony. This distinction is very clearly expressed in the case of *United States v. Ross*, 1 Gall. 624.

"If a number of persons conspire together to do any unlawful act, and death happen from anything done, in the prosecution of the design, it is murder in all who take part in the same transaction. If the design be to commit a trespass, the death must ensue in prosecution of the original design to make it murder in all. If to commit a felony, it is murder in all, although the death take place collaterally or beside the principal design. More especially will the death be murder, if it happen in the execution of an unlawful design, which if not felony is of so desperate a character that it must ordinarily be attended with great hazard to life; and *a fortiori*, if death be one of the events, within the obvious expectation of the conspirators."

In the third count of the indictment, the prisoner is charged with no assault upon the mother of the child. There is therein no allegation that any wound of any description had been inflicted upon her, or any injury done, suited of itself to cause death. It is manifest, that of whatever he is accused in reference to the intention of causing miscarriage, and the measures employed to carry out that intention, and the success attending it, it was by the consent of the mother if not by her procurement.

This count alleges the design to cause the miscarriage, by means of the forcing and thrusting up into the womb of the wire, and the subsequent miscarriage; also the sickness and distemper ensuing immediately afterwards, followed by the death of the mother. It is alleged that the means used to procure the miscarriage were the cause of death; but it was evidently intended to be charged as the remote cause. The charge substantially is, that the miscarriage was the proximate cause of the death.

In the case of *Commonwealth v. Parker* the indictment is in very nearly the same language as that employed in the count we are now considering, as touching the charge of the subordinate offense, excepting in that, there was no allegation that the mother was "quick with child," whereas in this it is so alleged. By reason of that omission, it was held, and we think properly, that no offense at common law was charged. Consequently in this, so far as it regards the subordinate offense, the defendant is charged with what at common law was an offense, by causing the abortion of a child so far advanced in its uterine life that it was supposed capable of an existence separate from the mother; and not with any crime arising from an injury to the mother herself.

The conclusion is, therefore, that in this count the defendant is accused of causing death in the pursuit of an unlawful design, without intending to kill; and that the death was not in the execution of that unlawful design, but was collateral or beside the same.

That part of the indictment upon which the judgment and sentence against the prisoner is based is for a violation of the statute, which has in this respect essentially changed the common law. There is a removal of the unsubstantial distinction, that it is no offense to procure an abortion before the mother becomes sensible of the motion of the child, notwithstanding it is then capable of inheriting an estate; and immediately afterwards

is a great misdemeanor. It is now equally criminal to produce abortion before and after quickening. And the unsuccessful attempt to cause the destruction of an unborn child is a crime, whether the child be quick or not: R. S., c. 160, secs. 13, 14.

We now come to the consideration of the question whether the subordinate offense, as charged in the third count in the indictment, is a felony or otherwise, under the statute.

By the revised statutes, c. 167, sec. 2, the term "felony," when used in any chapter in the title of "crimes and offenses," etc., shall be construed to include murder, rape, arson, robbery, burglary, maims, larceny, and every offense punishable with death, or by imprisonment in the state prison.

Every person who shall use and employ any instrument with intent to destroy the child of which a woman may be pregnant, whether such child be quick or not, and shall thereby destroy such child before its birth, shall be punished by imprisonment in the state prison, not more than five years, or by fine, etc.: R. S., c. 160, sec. 13.

It is obvious, if the prisoner be charged with the murder of the mother in proper form, in the commission of the subordinate crime, and the subordinate crime is such as is described in the statute referred to, and that is properly charged, the judgment and sentence upon this count is authorized, and there is no error therein. But if the subordinate offense as charged, does not constitute a felony under the statute, the judgment and sentence are erroneous.

The offense described in the statute, c. 160, sec. 13, is not committed unless the act be done with an "intent to destroy such child" as is there referred to, and it be destroyed by the means used for that purpose. It is required by established rules of criminal pleading, that the intention which prompted the act that caused the destruction of the child, as well as the act itself and the death of the child thereby produced, should be fully set out in the indictment, in order to constitute a crime punishable by imprisonment in the state prison, under the statute. The allegation that a certain instrument was used upon a woman pregnant, and that the use of that instrument caused her to bring forth the child dead, is not a charge that the one using the instrument intended to destroy the child. The inference of such design, from the use of the instrument and its effect, is by no means necessary.

The third count in the indictment alleges the act to have been done with the intent to cause and procure the deceased to mis-

carry and bring forth the child of which she was then pregnant and quick; and that by means of that act she brought forth the child dead. But there is no allegation that the act was done with the intention that she should bring forth her child dead, or with an intent to destroy it, unless the words "miscarry," and "bring forth the child," necessarily include its destruction.

"The expulsion of the *ovum*, or embryo, within the first six weeks after conception is technically miscarriage; between that time and the expiration of the sixth month, when the child may by possibility live, it is termed abortion; if the delivery be soon after the sixth month, it is termed premature labor. But the criminal attempt to destroy the fetus at any time before birth is termed in law a miscarriage, varying, as we have seen, in degree of offense and punishment, whether the attempt were before or after the child had quickened:" Chit. Med. Jur. 410. Other writers on the subject give a similar definition of the term "miscarriage:" Hoblyn's Dictionary of Terms, used in medicine and other collateral sciences. The converse of this last proposition can not be true, as there are undoubtedly many miscarriages involving no moral wrong.

If the term "miscarriage" were to be understood in the indictment in its most limited sense, it can not be denied that, in effect, it must be identical with the destruction of the fetus. But this indictment itself has given to the word "miscarriage" the more general signification. It charges that the miscarriage was of the woman who was pregnant and "quick with child." The term "quick with child" is a term known to the law, and courts are presumed to understand its meaning. A woman can not be "quick with child" until a period much later than six weeks from the commencement of the term of gestation. The more general meaning of the word "miscarriage" must, therefore, be applied. The indictment charges no time, after the quickening, when the miscarriage took place. It may have been at any period when the birth would have been premature. The language of the indictment, when taken together, construed in its ordinary or in its technical and legal signification, does not forbid this. And labor is premature if it take place at any period before the completion of the natural time.

It is admitted by Dr. Paris, a writer of high repute on medical jurisprudence, from the number of established cases, it is possible that the fetus may survive and be reared to maturity though born at very early periods. Many ancient instances are stated of births even at four months and a half, with continued

life even till the age of twenty-four years. And the parliament of Paris decreed that an infant at five months possessed the capability of living to the ordinary period of human existence; and it has been asserted that a child delivered at the age only of five months and eight days may live; or, according to Beck and others, if born at six months after conception: Chit. Med. Jur. 410, 411. Many of the facts upon which the opinions of writers upon medical jurisprudence are founded may be erroneous, and the opinions incorrect. We can not take judicial notice of either. But it is not too much to say that a child may be born living, when its birth may be so soon after conception that it is premature. The fetus may be expelled by unlawful means so soon after conception that extra-uterine life can not continue for any considerable length of time, and yet after birth it may once exercise all the functions of a living child. We have found no authority that this may not be termed a miscarriage, if the word is not confined to its most limited meaning. And if it be so, it is not perceived that it ceases to be correct, if the life of the child prematurely born is further prolonged. It is quite clear, therefore, that the word "miscarriage" in its legal acceptation, and as used in this indictment, does not necessarily include the destruction of the child before its birth; and a design to cause its miscarriage is not the same thing as a design to destroy the child.

The other term used in the indictment, "to bring forth the said child," does not imply even a premature birth. Consequently it gives no additional strength to the charge.

It follows that the indictment, not containing an allegation of a design, which is an essential ingredient in the offense first charged in the third count to make it a felony, the subsequent and principal accusation is that of manslaughter only; and the seventeenth, eighteenth, and nineteenth errors are well assigned.

Many other errors are assigned and relied upon. In the discussion of the principles involved in the questions raised, the counsel for the plaintiff in error and the attorney general have exhibited great research, learning, and ability.

It might be desirable to the profession, and particularly to those interested in criminal pleading, that there should be an opinion upon each of the errors assigned; but it is unnecessary for a disposition of the case.

Judgment reversed, and the court order that the prisoner be discharged from his imprisonment, and go thereof without day.

PERFORMING OPERATION TO PROCURE ABORTION was not indictable at common law, if done with the woman's consent, unless she was quick with child: *State v. Cooper*, 51 Am. Dec. 248, note 253; *Commonwealth v. Parker*, 43 Id. 396.

DISTINCTION BETWEEN MANSLAUGHTER AND MURDER: See *Sutcliffe v. State*, 51 Am. Dec. 459, note 464, where other cases are collected.

OFFENSE OF ADMINISTERING DRUG TO PREGNANT WOMAN with intent to produce a miscarriage, and that of administering it with intent to kill the child, are distinct offenses: *Lohman v. People*, 49 Am. Dec. 340.

FELONY, WHAT IS: See note to *Crenshaw v. State*, 17 Am. Dec. 791.

THE PRINCIPAL CASE IS CITED in *State v. Mayberry*, 48 Me. 236, to the point that crimes referred to in the statute as punishable by imprisonment in the state prison are such as are liable to be thus punished, and not such only as must be so punished. Another decision in the same case may be found in this volume, under the title *State v. Smith*, ante, p. 578.

KING v. ROBINSON.

[33 MAINE, 114.]

JUDGMENT MAY, BY COMMON LAW, BE RENDERED AGAINST ONE NON COMPOS MENTIS, upon contracts or liabilities by which he is legally bound. APPOINTMENT OF GUARDIAN AD LITEM FOR PERSON NON COMPOS MENTIS, rests in the discretion of the court.

PLAINTIFF IS NOT BOUND TO ASCERTAIN MENTAL CAPACITY OF DEFENDANT, and to bring it before the court, in order that a guardian *ad litem* may be appointed.

CONTRACT OR LIABILITY ASSUMED BY PERSON WHILE OF SOUND MIND may be enforced against him when he is of unsound mind.

PERSON OF UNSOUND MIND, OF FULL AGE, MUST APPEAR BY ATTORNEY, and not by guardian; and therefore it can not be alleged as error, in a proceeding to reverse a judgment rendered against such person, that no guardian had been appointed for him.

ERROR *coram nobis*. The opinion states the facts.

Paine, for the plaintiff in error.

Clifford and Porter, for the defendant in error.

By Court, SHEPLEY, C. J. This writ of error *coram nobis* has been commenced by the guardian of the original defendant to procure the recall or reversal of a judgment rendered in this court.

A motion was made to quash the writ and proceedings for certain alleged irregularities, which motion was overruled, and exceptions were filed and allowed, which have been waived, as it is said, to have a decision upon the merits. The exceptions are therefore overruled, but this will authorize no inference that the proceedings are considered to have been correct.

The error assigned is, “ that the said King at the time of the rendition of the said judgment was *non compos mentis*; and incapable of taking care of himself, nevertheless no guardian for said King was appointed, and no guardian *ad litem*, and there was no notice of the pendency to said action given to, and there was no appearance by, any such guardian at or prior to the rendition of said judgment.”

It may be doubtful whether it was intended to allege the error to have consisted in the rendition of a judgment against one *non compos mentis*, or in the rendition of it without the appointment of a guardian, or a guardian *ad litem*.

It is not probable that was intended to allege that a judgment rendered against one *non compos mentis* must, of course, be erroneous, for by the common law a judgment may be rendered against such a person founded upon contracts or liabilities by which he is legally bound. If such were the intention, the position could not be sustained. It would be opposed to the general current of authority.

The cases which determine how such a person shall appear and plead, as well as cases to be hereafter noticed, show that judgments at law and decrees in equity may be properly entered against them when they are properly represented.

It is not alleged in the assignment of errors that a guardian had been appointed by any competent tribunal before the judgment was rendered; or that he was an idiot or an infant. Whether the judgment was erroneous must therefore depend upon the question whether the person alleged to be *non compos mentis* was under such a state of facts properly represented before the court.

In many jurisdictions after an inquisition has been taken, and it has been ascertained that the person is of unsound mind, and his person and estate have been committed to a committee or guardian, a suit at law for any practical purpose may not be maintainable. The custody of the persons and estates of idiots and lunatics was given to the crown by statutes: 17 Edw. II., c. 10, 19. A person aggrieved by such an inquisition was entitled by statute, 2 Edw. VI., c. 8, sec. 6, to traverse it, and if not entitled he might obtain permission of the chancellor to do it, and if successful he might obtain a judgment on a contract or liability assumed during the alleged idiocy or lunacy: *Ex parte Wragg*, 5 Ves. 450; *Ex parte Hall*, 7 Id. 261; *In the Matter of Fitzgerald*, 2 Sch. & Lef. 432. In New York it has been regarded as a contempt of the court, having by statute the custody of the

persons and estates of such persons, to commence and prosecute an action at law against them without permission: *L'Amoureux v. Crosby*, 2 Paige, 422 [22 Am. Dec. 655]; *Matter of Heller*, 3 Id. 199.

Where, as in this state, no such obstacle exists, the inquiry is presented, whether the original defendant, being of age and not an idiot, but *non compos mentis*, was properly represented before the court. The record shows that service was regularly made upon him, and that he appeared by attorneys. "An idiot in an action brought against him shall appear in proper person, and he who pleads best for him shall be admitted, as appears in 33 Hen. VI., 18, b. Otherwise it is of him who becomes *non compos mentis*, for he shall appear by guardian if he is within age, and by attorney if he is of full age," is the rule laid down in *Beverley's Case*, 4 Co. 123. And although one point asserted in that case, that no one shall be permitted to stultify himself, has been denied to be correct, especially in this country, the rule now presented does not appear to have been at any time denied to be a correct one. It has the sanction of the best authorities: *Dennis v. Dennis*, 2 Saund. 333, note 4; Com. Dig., Idiot, D, 7. This court is authorized to appoint a guardian *ad litem*, when a party becomes insane pending the suit: Me. R. S., c. 115, sec. 86; act approved on July 19, 1849, c. 104. And it may by implication be authorized to do it when the person was not of sound mind before the suit was commenced: Me. R. S., c. 110, sec. 33. The court can have no knowledge of the fact until it receives it from some proper source; and it is then a matter of discretion, to be exercised or not according to its judgment upon the proof presented.

The law does not appear to have imposed it as a duty to be performed by a plaintiff, to ascertain the mental capacity of a defendant and to bring it before the court for its consideration, that such a guardian may be appointed. It may be prudent in cases of doubt for him to do so, lest his judgment should be liable to be disturbed by a petition for a review, or possibly by a suit in equity.

There being no legal obligation resting upon the court or upon the plaintiff to ascertain the facts and have such a guardian appointed, its omission can not be assigned as error.

When one *non compos* has been properly before the court, "acts done by matter of record, as fines, recoveries, judgments, statutes, recognizances, etc., shall bind as well the idiot as he who becomes *non compos mentis*:" *Beverley's Case*, 4 Co. 123; *Mansfield's Case*, 12 Id. 124; Fonbl. Eq., b. 1, c. 2, sec. 2, note k.

Nothing can be assigned for error, which contradicts the record: 2 Saund. 101, 102; Com. Dig., Pleader, 3, B, 16; *Helbut v. Held*, 1 Stra. 684.

When the record of a domestic judgment states that the defendant appeared by attorney, testimony to prove that the attorney was not duly authorized can not be received, for it would contradict the record. If the question be, whether a foreign judgment was rendered by a court having jurisdiction and there be found in the record a statement that the defendant appeared by attorney, such testimony may be received, for the reason that there can, properly speaking, be no record made by a court having no jurisdiction: *Anonymous*, 1 Salk. 88; *Stanhope v. Fermin*, 3 Bing. N. C. 301; *Hall v. Williams*, 6 Pick. 232 [17 Am. Dec. 356]; *Gleason v. Dodd*, 4 Met. 333; *Aldrich v. Kinney*, 4 Conn. 380 [10 Am. Dec. 151]; *Starbuck v. Murray*, 5 Wend. 148 [21 Am. Dec. 172]; *Reed v. Pratt*, 2 Hill (N. Y.), 64.

In the case of *Dennis v. Dennis*, 2 Saund. 329, the original defendant appeared by attorney, and by her next friend brought a writ of error to reverse it. The error assigned was, that she was an idiot, a *nativitate*, and that she ought to have appeared by her friend, and not by attorney. The defendant in error presented by plea an issue on the fact of her being an idiot, a *nativitate*, which was joined, and the plaintiff in error was nonsuited, and the judgment was affirmed. This affirmance appears to have been made upon the rule laid down as before stated in *Beverley's Case*.

In the case of *White v. Palmer*, 4 Mass. 147, the error assigned was, that the original defendant was *non compos mentis*, and that White and Hall, long before the teste of the writ, had been legally appointed guardians, and that they had no notice of the suit. The judgment was reversed for that cause, but the case does not decide that the judgment would not have been legal if the *non compos* had not been under guardianship.

In the case of *Hathaway v. Clark*, 5 Pick. 490, the error assigned was that the original defendant, at the time of the service of the writ and of the rendition of judgment, was under guardianship as a person *non compos mentis*. The fact of his being thus under guardianship was traversed, and an issue joined thereon was found for the defendant in error, and the judgment was affirmed. The mere fact that the defendant was of unsound mind at those times does not appear to have been considered as constituting any objection to an affirmance of the judgment.

In criminal proceedings, the defense according to the usual

course of proceeding is often made by an attorney not assigned by the court, that the accused was insane. The verdict of conviction or acquittal may have been found after a decision upon that ground of defense. It would present an anomaly in judicial proceedings to find it assigned for error, that no guardian *ad litem* or other guardian was appointed to conduct the defense. In such cases, it is true that the accused must appear in person and answer to the charge. Yet if he be actually insane then, that affords him no advantage for his own protection. His defense is managed by an attorney selected by himself or by his friends, and it is not known that this course of proceeding in the administration of criminal law has occasioned any grievance requiring redress.

In the administration of justice in civil cases there is an intrinsic difficulty in cases of alleged unsoundness of mind, in framing a rule for the protection of such persons before the trial, when they have not by some competent tribunal been adjudged to be of unsound mind.

Whether the weakness of mind or decay of intellect is so great as to prevent their being regarded as *compos mentis*, is often a question of great delicacy and difficulty—one which in many cases can only be decided properly after a most careful and thorough investigation and examination of testimony. If a court upon affidavits and counter-affidavits should decide in such cases not to appoint a guardian *ad litem*, this being a preliminary proceeding would not ordinarily appear of record, and if it were regarded as error for a *non compos* of full age to appear and defend by attorney, he might bring error, assign for error his unsoundness of mind and the omission to appoint a guardian *ad litem*, and try before a jury the very question submitted in the first instance to the decision of the court, and have that decision regarded as erroneous, and the foundation of a writ of error to reverse the judgment. Not only so, but the same question may have been also submitted to the jury as a ground of defense in the original action, and have been decided by them also, and then again be submitted to another jury in a writ of error.

The mere fact that a party defendant is *non compos mentis* during any of the preliminary proceedings, or when judgment is rendered, constitutes no ground of defense, for both at law and in equity a contract or liability assumed by him while of sound mind may be enforced against him when he is of unsound mind: *Yates v. Boen*, 2 Stra. 1104; *Kernot v. Norman*, 2 T. R. 390; *Nutt v. Verney*, 4 Id. 121; *Ibbotson v. Galway*, 6 Id.

133; *Steel v. Alan*, 2 Bos. & Pul. 362, 437; *Pillop v. Sexton*, 3 Id. 550; *Baxter v. Portsmouth*, 2 Car. & P. 178; *Hathaway v. Clark*, 5 Pick. 490; *Robertson v. Lain*, 19 Wend. 649; *Clarke v. Dunham*, 4 Denio, 262; *Owen v. Davies*, 1 Ves. sen. 82; *Niell v. Morley*, 9 Ves. 478; *Anonymous*, 13 Id. 590.

Cases have been cited to show, and they do show, that a judgment rendered against an infant will be erroneous if the record shows that he appeared by attorney and not by guardian. The inference thence appears to have been drawn, that the rule is the same respecting the appearance of one of full age and of unsound mind. The inference is unauthorized. The rule respecting the appearance of an infant, whether of sound or unsound mind, is, that he must appear by guardian: *Heskett v. Lee*, 2 Saund. 96, note 1; Com. Dig., Pleader, 2, c. 2; *Beverley's Case*. And one of unsound mind of full age must appear by attorney.

Nor does it appear to be essential that the law should be otherwise for the protection and preservation of the rights of persons *non compos mentis*. The defense must be that he was in that condition when the contract was made or liability incurred; and the only cause of complaint must be that he was not in a condition to have a fair trial. If it should be made to appear that he did not on that account have a fair trial, and that injustice had been done, the court, upon petition, might grant a review.

And when a judgment wholly unjust has been obtained against one *non compos mentis*, he may, in certain cases, obtain relief in equity by a perpetual injunction against the enforcement of that judgment.

In the case of *Homer v. Marshall*, 5 Munf. 466, a judgment appears to have been obtained against a monomaniac for slanderous words spoken of one with reference to the subject concerning which his mind was unsound, and a perpetual injunction was obtained against the enforcement of that judgment.

Judgment affirmed.

LIABILITY OF INSANE PERSON ON HIS CONTRACTS: See *Beals v. See*, 49 Am. Dec. 573; *Jackson v. King*, 15 Id. 354, note 361, where this subject is discussed at length.

JUDGMENTS AGAINST LUNATICS: See *Allison v. Taylor*, 32 Am. Dec. 68, note 70.

THE PRINCIPAL CASE IS CITED IN *Paul v. Hussey*, 35 Me. 99, and in *Clark v. Hackett*, 1 Cliff. 282, to the point that nothing can be assigned for error which contradicts the record. It is also distinguished in *Leach v. Marsh*, 47 Me. 556, and criticised in the same case at page 554, so far as it decides that it is not the duty of the plaintiff to ascertain the mental capacity of the defendant.

BALLARD AND WIFE v. RUSSELL.

[33 MAINE, 196.]

BOTH HUSBAND AND WIFE MUST JOIN IN ACTION OF TORT brought to recover damages for personal injuries sustained by the wife, and his previous desertion of her does not remove the necessity of his joining as co-plaintiff.

STATUTES GIVING ADDITIONAL RIGHTS AND REMEDIES TO MARRIED WOMEN relate to property, but do not apply to actions for torts.

HUSBAND'S DISCHARGE OF CAUSE OF ACTION IS BAR to an action for tort brought in the joint names of husband and wife.

CASE for an injury to the female plaintiff, by malpractice of the defendant in attempting to reduce a fracture of the forearm and dislocation of the wrist. Prior to the injury the husband had deserted the wife, and for eight years had made no provision for her support. The defendant introduced an unsealed discharge signed by the husband, which had been given before the commencement of the suit, and in which it was stated that the husband had received from the defendant fifty dollars in full for the injury. The female plaintiff's counsel then offered a document, bearing date one day later than the discharge, by which the husband assigned to the wife the cause of action, and empowered her to collect the same for her use, and to make all needful use of his name. The case was taken from the jury and submitted to the court. If the court should be of opinion that the discharge given by the husband would defeat the action, plaintiff's counsel moved to amend by striking the husband's name from the writ, and that thereupon the action should stand for trial.

By Court, **WELLS, J.** It is suggested that the discharge by the husband to the defendant was obtained through fraud. The court can not yield to that suggestion. If the plaintiffs would have availed themselves of it, the question should have been submitted to the jury.

By the common law, both husband and wife must join to maintain an action like the present. This case does not come within any exception to the principles stated. The husband has not abjured the realm; and the facts stated in the report of the case do not deprive him of the power to control the action nor to discharge the cause of it.

The statutes giving additional rights and remedies to married women relate to property, and do not apply to this case. Hence the proposed amendment, by striking out the name of the husband, would be of no advantage to the wife.

It appears that the husband, the day after he had discharged the cause of action, gave his wife a written power of attorney to prosecute the claim for her own benefit. But the cause of action, having been previously discharged, could not be revived by such an instrument.

It results that the action can not be maintained, and the plaintiffs must be called.

WIFE, WHEN MAY SUE AND BE SUED AS FEME SOLE: See note to *Arthur v. Broadnax*, 37 Am. Dec. 709; *Mead v. Hughes' Adm'r*, 50 Id. 123, note 127; *Robinson v. Reynolds*, 15 Id. 673.

THE PRINCIPAL CASE IS CITED in *Long v. Morrison*, 14 Ind. 597, to the point that a husband can settle and release an action for personal injuries to his wife by malpractice.

SPOFFORD ET AL. v. TRUE.

[33 MAINE, 283.]

CONDITION IN GRANT OF LAND THAT CONVEYANCE SHALL BE VOID if subsequent payment be not made according to the terms thereof is a condition subsequent, and the fee vests in the grantee upon the delivery of the deed, although it reserves towards such payment a lien on the lumber which the grantee may take from the land conveyed; and until entry for condition broken, the title to the land remains vested in the grantee.

WHERE GRANTOR OF LAND GIVES TO GRANTEE RIGHT TO CUT LUMBER thereon, without limitation as to the person who may do it, subject to a lien thereon for the payment of the purchase money of the land, the lumber may be lawfully removed from the land by persons who have contracted with the grantee for getting it out, and the grantor will be regarded as having fully authorized such contract.

LIEN RESERVED IN GRANT OF LAND UPON LUMBER which the grantee may cut thereon is postponed to the lien given by the statute to laborers who have aided him in getting it out.

STATUTE GIVING LIEN TO LABORERS FOR SERVICES performed by them in converting standing trees into logs, masts, spars, and other lumber does not conflict with the constitution, nor abridge the right of the citizen to acquire, possess, and protect property.

WHERE OWNER NEGLIGENTLY INTERMINGLES LOGS CUT BY DIFFERENT COMPANIES of workmen, so that the lots upon which the several laborers worked can not be distinguished, the respective liens of the workmen will be upon the whole mass.

LIEN OF LABORERS ON LUMBER GOT OUT BY THEM IS RESTRICTED to the personal services of the claimant, and does not extend to expenses incurred in getting into the woods.

TROVER. The agreed statement of facts showed that the plaintiffs, who had been the proprietors of a township of tim-

bered land, conveyed it to William McCrillis, his heirs and assigns, to be paid for at several successive periods, and upon the condition that the conveyance should be void if the payments were not made. The grant reserved a lien of five dollars on each thousand feet of lumber that should be taken from the tract. McCrillis made a contract with Haynes & Co., by which they were to cut, haul, and drive to the boom a large quantity of logs. In the execution of their contract they employed a large number of laborers, who were divided into four gangs, each of which worked on distinct parts of the township and hauled the logs cut by them to separate landings. All the logs were marked alike, and were driven down the river by Haynes & Co. When they arrived at the boom they were so intermixed that it was impossible to tell which of them had been drawn to either of the four landings. The laborers instituted suits against Haynes & Co., to enforce the lien given in such cases by the statute of 1848. The logs were attached and sold by the sheriff according to law. This action is brought against the sheriff by the grantors of McCrillis, who claim the logs, the condition in their deed never having been performed. Other facts appear from the opinion.

McCrillis and Crosby, for the plaintiffs.

A. W. Paine, for the defendant.

By Court, TENNER, J. The condition in the conveyance from the plaintiffs to McCrillis is subsequent; the fee in the land, therefore, vested in the grantee on the delivery of the deeds. There has been no re-entry for the forfeiture, on account of the breach of the condition; and so far as our consideration is demanded in this case, we must regard the forfeiture as waived for the present, and the title to remain as it was at the time of the conveyance: 1 Shep. Touch. 118 et seq.; 4 Kent's Com., lec. 56. The deeds convey the land to the grantee, his heirs and assigns. They give the right to cut timber, with no limitation as to the person who may do it, subject to a lien thereon, for the payment of five dollars for every thousand feet cut, board measure. The right to dispose of the timber by the grantee, subject to this lien, to be taken off by himself, or by others whom he may employ under a contract, such as that made by him, and James and Alvin Haynes, must be conferred, when the grantee has the power to convey the entire estate, by the terms of the deed, subject to the same lien. The case is unlike that of *Emerson v. Fisk*, 6 Greenl. 200 [19 Am. Dec. 206],

where the title of the land was not intended to be conveyed, and the entire ownership of the timber continued in Emerson, who had given those under whom the defendants claim it the right to cut it exclusively for him.

The timber may be considered as having been lawfully removed from the land, and driven to the boom, by virtue of a contract, which the plaintiffs had fully authorized. At the time of the conveyance, the statute of 1848, c. 72, was in force. That secured a lien upon all logs, masts, spars, and other lumber, in favor of those who aided in cutting, hauling, or driving them for their personal services.

This lien is analogous to liens upon vessels and upon buildings, in favor of laborers, who have been employed in their construction. It takes away none of the rights of the owner, nor the one interested therein, by a lien or otherwise, any further than is necessary for the security of those who are presumed to have added something to its value, equal to the expense, at least, incurred. It is in the power of the owner, who wishes to dispose of such property, to guard against any loss from the lien which may exist afterwards upon it by the authority of the statute, by taking other security for his purchase money, besides retaining an interest in the property itself. The statute in its prospective operation—and in this case it can have no other—is no abridgment of the rights of the citizen, secured to him by the constitution of the state, in article 1, section 1, of “acquiring, possessing, and protecting property.” It subjects the property to the payment of debts, which the owner has directly or indirectly caused or authorized, in its improvement, under a knowledge that the property is so charged. In principle it in no respect differs from the lien at common law in favor of mechanics who have bestowed labor upon the article which it attaches. The statute provides for its existence in cases where the possession is not supposed to be in the one to be benefited by the lien.

It was evidently intended by the legislature that the lien of laborers was not to be postponed to that of other individuals. Their claim commences immediately upon the performance of services in converting standing trees into logs, masts, spars, and other lumber, where it may be enforced in a manner which shall be speedy, simple, and effectual. The statute protects the laborer in his earnings, without obliging him to follow the property which he has aided in making more valuable, after it has been taken into possession of those persons who may have at-

tempted to sustain a prior lien; and frees him from exposure to loss, arising from the tardy and uncertain process of attempting to secure any interest remaining after such liens have been discharged, when it may have passed from the scene of his labors, and so changed that its identity can no longer be traced. The exception in favor of the commonwealth of Massachusetts and the state of Maine, in the statute, confirms this view. The lien which is preferred to that of the laborers is what was expected to be proper in the sales of land, for the security of the purchase money. And the statute will not admit of the construction that there is to be a still further exception in favor of other grantors who may attempt to provide the same kind of lien, when the plain language itself expressly forbids it.

But it is insisted that the lien under the statute can not extend to lumber to which the one claiming the lien contributed nothing, in cutting, hauling, or driving the same. The mischievous results of a more liberal application of the provision, pointed out by counsel in certain cases, are very apparent, and we can not suppose for a moment that the lumber which was taken and sold in satisfaction of the debts, in favor of the laborers represented by the defendant, was in each case exclusively that which the creditor aided in cutting and hauling. The case finds that the logs cut and hauled by the several companies of men could not be distinguished by the defendant, but in the passage of the logs from the forest to the boom, they were so intermingled that the labors of the distinct companies were not distinguishable. There were no artificial badges upon the several parcels of logs, so that those cut by one company could be separated from those cut by another; and although the logs cut by some of the companies were of different sizes and qualities from those cut by others, it was manifestly a case of the confusion of goods, which may take place in reference to lumber: *Hesseltine v. Stockwell*, 30 Me. 237 [50 Am. Dec. 627].

Assuming that the counsel for the plaintiffs are correct in their proposition that the lien of each laborer is confined to the lumber which he aided in removing from the land, it may be proper to ascertain who are to be regarded in this action as responsible for the intermixture; and what was the character of the acts which caused it.

The plaintiffs, their grantee, and those whom the latter employed to cut, haul, and drive the logs knew, constructively at least, that those who should bestow labor upon them in these operations would have a lien thereon for the value of their per-

sonal services. They were all affected by that knowledge after the logs were cut and hauled. The men who were employed merely as operatives had no authority to put thereon their own distinguishing marks, or to interfere in directing the mode in which they should be removed from the landings and driven to the boom. And their claim ought not to be taken away by any of the parties, including the plaintiffs, who were interested in the lumber by an intermixture, which the laborers had no power to prevent. The plaintiffs conveyed the land, and gave authority for the removal of the timber. Every process in cutting, hauling, and driving the logs was in the prosecution of their original intention when they made the conveyance.

They were in their hands, or in the hands of those who had been employed by virtue of their contract, through all the different stages of their progress, from standing trees till they were indiscriminately turned into the streams and the river, and driven to the boom. Everything done to the timber from the first to the last of these operations was just what the plaintiffs expected would be done, and in doing which there was no violation of any contract which had been made with them touching the ultimate object, or the mode by which it was brought about. The logs were constructively in their possession for the purpose of preserving their own lien thereon, subject to the statute lien of the laborers, if the latter existed at the time of the attachment by the defendant's deputy, and had so been from the time they were cut: *Bradeen v. Brooks*, 22 Me. 463.

Is it then for the plaintiffs to claim to hold the logs free from the laborers' lien? Before they can do this successfully, would not justice demand that they should show that they had done all in their power to preserve it; that it should be proved that they had stipulated that nothing should take place which would impair it, instead of claiming a discharge of it, a forfeiture of the rights under the statute, by at least their own want of care? If the lien was lost, it is manifest that it was done by the omission to perform some duty in some of the agents employed in driving the logs which the plaintiffs should have required to be done.

We can not doubt that the plaintiffs must be treated as having so far caused the mixture of the logs that, had the confusion been done wrongfully, the lien of the laborers is not extinguished. This brings us to the other inquiry, What was the character of the acts which caused the confusion? Was the intermixture brought about by fraud, by accident, or by carelessness or inadvertence?

In view of all the facts in the case, it would be too much to say the confusion originated in fraud. There is a manifest want of all the material elements of fraud in the plaintiffs and in all those who had any agency in driving the logs and causing the mixture. On the other hand, it can not be said that the intermingling was the fruit of accident. The plaintiffs, their grantee, and those who contracted to cut, haul, and drive the logs under him must have known fully their situation. The parties to the deeds knew, or were bound to know, all the claims existing upon them, and the propriety of such a course as would continue them in their full vigor. There may have been a want of knowledge of the nature of the laborers' claim and its extent, but this ignorance of the law can not excuse the plaintiffs, so that they can invoke it for their own benefit at the expense of those who rendered the services. No care was taken to keep separate the logs hauled by the different companies of laborers respectively, by the agents employed after they were placed upon the landings, and no marks were put upon them for the purpose of enabling them to make the proper division. It has the character of an intermixture produced by negligence or inadvertence.

What is the rule applicable to a confusion caused by negligence or inadvertence when the separation can not be made and the whole mass is different in quality from those parcels which produced it? Judge Story in his treatise on bailments, sec. 40, deduces the rule, from the authorities, in these words: "If the mixture is indistinguishable, and a new ingredient is formed, not capable of a just appreciation and division according to the original rights of each, then the party who occasions the wrongful mixture must bear the whole loss." In the case of *Lupton v. White*, 15 Ves. 432, Lord Chancellor Eldon says: "The defendant, White, as far as he is concerned, is involved in it simply in consequence of his own undertaking. No misconduct or fraud is imputed to him. He is culpable, not morally, but only for having applied too little attention to his own interest." The condition of the plaintiffs in some respects is not essentially unlike that of White in the case referred to. White had undertaken that articles belonging to the plaintiff and the other party should be kept separate. His agent and lessees omitted to do it. A mixture took place of articles of different qualities; and no account was kept of those which came from the plaintiff, and not being distinguishable, the plaintiff was held entitled to the whole. In the case at bar no moral wrong was imputable to

the plaintiffs; but such an inattention to the lien of the laborers is shown that they are so far responsible for the negligence which was the cause of the confusion that they can not claim to hold the logs discharged of the statute lien for their own benefit, and turn over to persons, who may be irresponsible, those individuals who performed the services and for whose protection the provision of the law was made.

In this case the several parcels of logs, cut by the different companies of workmen, all belonged to the plaintiffs, so far as the lien in their favor extended, subject to the statute lien of those workmen. Was it then a mixture of property of different values, belonging to different individuals? Each parcel of logs was the property of each laborer who had rendered personal service in their removal from the land, so long as his claim was in full force, and nothing but the lien excepted from the operation of the provision of the statute, could supersede it. As between such laborer and the plaintiffs, all the other parcels, according to the facts in the case, were the property of the latter. If the confusion had been caused by carelessness, for which they are responsible, and each laborer failed in consequence to distinguish the logs to which the lien originally attached; and the logs were of different qualities, so that he could not obtain those of similar value to his own, he would be entitled to sufficient to satisfy his claim from the whole mass produced by the confusion. From the facts agreed, the defendant, as the representative of the workmen who caused the attachments to be made, is not responsible in this action to the plaintiffs.

In the case of *William McMaster v. James and Alvin Haynes*, he appears by the documents in the case to claim for services rendered for them, in cutting and hauling logs; he also claims the sum of six dollars and thirty-seven cents, for the payment of expenses in getting into the woods. Without the statute, the laborers would have no right by attachment upon the lumber, in satisfaction of their services against those who did not own it. The lien is restricted to the "personal services" of the one who claims the benefit of it, and can not extend to the charge last referred to.

It does not appear that any distinction was made in the sale of the logs to satisfy that part of the claim which was for personal services, and the other portion of it. But it appears from the statement of facts that the suit is still pending, and upon leave granted, the writ may be amended, by striking out the charge to which the lien does not attach, and no objection will

exist to the application of so much of the proceeds of the sale as will satisfy the residue if he should obtain judgment therefor: *Gilbert v. Hudson*, 4 Greenl. 345.

Plaintiffs nonsuit.

DOCTRINE OF CONFUSION OF GOODS IS APPLICABLE TO MILL-LOGS: See *Hesseltine v. Stockwell*, 50 Am. Dec. 627, note 630, where other cases are collected.

CONDITION SUBSEQUENT IN DEED: See *Cross v. Carson*, 44 Am. Dec. 742, note 743, where this subject is discussed at length.

LIEN FOR SERVICES: See *McIntyre v. Carver*, 37 Am. Dec. 519, note 522, where this subject is discussed.

THE PRINCIPAL CASE IS CITED in *Murphy v. Adams*, 71 Me. 118, to the point that the object of the statute in giving a lien to those who have performed labor in getting out timber is to make certain the payment for the labor which has gone to increase the value of the timber.

PARSONS v. COPELAND.

[33 MAINE, 370.]

DEFENDANT IN SUIT IS NOT ESTOPPED BY AVERMENTS IN HIS DECLARATION in a former action to which the plaintiff in the present action was neither a party nor privy. But such averments may be used as evidence of his admissions in reference to the present plaintiff's rights, and may be shown by introducing the record in such former suit.

TITLE TO LAND ACQUIRED ACCORDING TO PROVISIONS OF STATUTE GIVING LIENS to laborers for services performed by them in the erection of buildings thereon is valid, although all the facts necessary to make out such title are not shown by the records. Parol testimony may be introduced to show when the payment for such services became due.

PETITION for partition of land. The conveyance mentioned in the opinion, from Copeland and Buswell and Lydia White to the respondent, was a deed with covenants of warranty; and the former suit, referred to in the opinion, was a suit at law brought by the respondent against said warrantors for a breach of their covenants. The other facts appear from the opinion.

J. Crosby, for the plaintiff.

J. and M. L. Appleton, for the defendant.

By Court, SHEPLEY, C. J. The title of the petitioner must depend upon proof that he performed labor by virtue of a contract, upon a building erected by Copeland and Buswell, whereby a lien upon the estate for its payment was created under the provisions of the statute: c. 125, secs. 37, 38. He appears to have commenced a suit against them on July 29, 1847, and to have caused the estate to be attached, and to have

recovered judgment and caused an execution issued thereon, to be levied upon an undivided portion of the estate. The respondent exhibits a conveyance of the whole estate from Copeland and Buswell, with Lydia White, to himself, made on December 8, 1846. To prove that he performed the labor and thereby acquired a lien upon the estate before it was conveyed to the respondent, the petitioner introduced a copy of the record of a suit commenced by the respondent against his grantors.

The counsel for the respondent insist that it is not legal testimony. Although it is not the record of a suit between the same parties, it may be legally introduced to prove the declarations or averment made by the then plaintiff and present respondent respecting the rights of the petitioner: *Ellis v. Jameson*, 17 Me. 235; *Cragin v. Carleton*, 21 Id. 492; *Heane v. Rogers*, 9 Barn. & Cress. 577; 1 Greenl. Ev., secs. 195, 527 a.

The counsel for the petitioner insists that the effect of the averments contained in that declaration is to estop the respondent from denying their truth. Parties and privies only are bound by estoppels, which must be mutual. That record constitutes no muniment of title, and the petitioner was no party to it. It does not, therefore, operate by way of estoppel. Those averments operate only by way of admission of the petitioner's rights. They are full to the effect, that the petitioner had acquired a lien upon the estate for the payment of his labor. There is no proof introduced by the respondent that they were made under any misapprehension of his legal rights, or tending to explain or contradict them. The report of the presiding judge made in that case was but an exhibition of the testimony introduced. It did not contain any declaration or admission made by either party; and it is not admissible as testimony in this case.

The declaration in the action of the petitioner against Copeland and Buswell contained averments that the labor was performed by virtue of a contract upon a woolen factory, according to an account annexed, which appears to have been for one hundred and fifty-seven and a half days' work, commencing on May 5th, and ending last of November, 1846. The declaration does not state that payment was to be made at a future day or time, or that it was not to be made as soon as the labor had been performed.

It does not, therefore, appear of record that the petitioner had acquired a title superior to that of the respondent. The petitioner's title is therefore resisted by an argument alleging in substance that if allowed to be effectual, no purchaser can in

such cases ascertain by the records whether he can acquire a good title to an estate; that if parol evidence may be admitted to prove any fact necessary to make out a title to real estate, there can be no safety in taking titles and conveyances of it.

If the effect should be that the records can not be so much depended upon for information respecting titles as they formerly were, this court can not refuse to give effect to a title acquired according to the provisions of a statute. The legislature must determine how far it is expedient to authorize titles to real estate to be acquired, without requiring all the facts necessary to make out such titles to be exhibited by the records.

This court can only explain and apply the enactments of the legislative department, when they are made in conformity to the provisions of the constitution. It can not determine that no fact necessary to make out a title to real estate shall be established by parol testimony. The statute provides, that "such lien shall continue in force for the space of ninety days from the time when such payment becomes due;" and that the benefit of it may be secured by attachment within the ninety days.

There is no provision that the declaration shall state whether any time for payment was allowed; or the time "when payment becomes due." It must be proved, therefore, like any other fact, by any legal testimony.

No other objections to the title of the petitioner are presented.
Judgment for partition.

ESTOPPELS OPERATE ON PARTIES AND PRIVIES ONLY, and not on strangers: See *Alexander v. Walter*, 50 Am. Dec. 688, note 702.

ESTOPPEL ARISING FROM ADMISSIONS: See *Dezell v. Odell*, 38 Am. Dec. 628, note 631, where this subject is discussed.

THE PRINCIPAL CASE IS CITED in *Parks v. Mosher*, 71 Me. 307, to the point that the effect of admissions of record may be explained by parol.

LOVEJOY v. ALBEE AND TRUSTEES.

[33 MAINE, 414.]

COURTS OF STATE HAVE NO JURISDICTION BEYOND ITS SOVEREIGNTY.

COURT OF STATE HAS NO JURISDICTION TO RENDER JUDGMENT against a party when neither he nor any property of his has been found within the state.

WHERE PARTY TO SUIT IS NOT WITHIN JURISDICTION OF COURT, a judgment rendered against him will be effectual only as a judgment *in rem*, acting upon such property as he may have within the jurisdiction.

JUDGMENT RENDERED BY COURT WITHOUT OBTAINING JURISDICTION, either of the person or property of the defendant, is merely void.

NO JUDGMENT CAN BE RENDERED AGAINST ONE AS TRUSTEE, where neither he nor the principal defendant resides within the jurisdiction, and no property of such defendant has been found here. This was the principle of the common law in force in this state, and it has not been changed by any statute.

STATUTE PROVIDING THAT JUDGMENT MAY BE RENDERED AGAINST ONE SUMMONED AS TRUSTEE, although he has never been an inhabitant of this state, applies only to cases in which the court has jurisdiction of the suit between the principal parties.

TRUSTEE process. It appeared that the defendants and the persons summoned as trustees all resided in the province of New Brunswick, and that no attachment of tangible property of the defendants had been made. The judge ordered the trustees to be discharged, and the plaintiff excepted.

Fuller and Harvey, for the plaintiff.

J. Granger, for the trustees.

By Court, **SHEPLEY, C. J.** No country can, by its laws, act directly upon persons not resident or found therein, or upon their property not found therein. The courts of a state or country can have no jurisdiction beyond its sovereignty. No court in this state can rightfully have jurisdiction to render judgment against a foreigner, when he has not been found within the state, and when no property owned by him has been found within it. When the person is not within the jurisdiction of a court and his property is within its jurisdiction, a judgment against him will be effectual only as a judgment *in rem* acting upon that property. Should a court render a judgment without obtaining such jurisdiction, it would be merely void: *Story on Conf. L.*, secs. 21, 539, 543, 546, 549, 550, 556; *Bissell v. Briggs*, 9 Mass. 462 [6 Am. Dec. 88]; *Borden v. Fitch*, 15 Johns. 121 [8 Am. Dec. 225]; *Picquet v. Swan*, 5 Mason, 35; *Douglas v. Forrest*, 4 Bing. 686; *Becquet v. McCarthy*, 2 Barn. & Adol. 951.

It is undesirable to have a state or country attempt, by its laws, to give its courts a jurisdiction beyond its sovereignty, for it could only cause a conflict of duties among persons thus subject to be acted upon by different laws and tribunals. It would exhibit a wrongful exercise of authority on the part of a state or country enacting such laws. Its statutes should not receive such a construction unless it be unavoidable. It is not contended that by the common law, or by the provisions of any statute existing previous to the year 1834, a judgment could be rightfully rendered against a person summoned as a trustee in a case like the present. It had been decided that no such judg-

ment could be rendered: *Tingley v. Bateman*, 10 Mass. 343; *Nye v. Liscombe*, 21 Pick. 263; *Jones v. Winchester*, 6 N. H. 497. It is insisted that the act of March 12, 1834, c. 139, conferred a jurisdiction sufficiently extensive to embrace this case; and that the same provision has been re-enacted in the revised statutes, c. 119, sec. 12.

The section last named does provide that a judgment may be rendered against a person summoned as a trustee, who has never been an inhabitant of this state. But it has reference to a case in which the court has jurisdiction of the suit between the principal parties. This is manifest from the clause which refers to an action that may be brought in the county where either the plaintiff or the principal defendant resides. The provision assumes that the court has rightfully jurisdiction of the suit between the principal parties. The purpose of the statute appears to have been to provide a remedy in a case where a person at no time a resident within the state was indebted to or had property belonging to a person resident or found within the state. In such case the court having jurisdiction of a suit against the principal defendant might act upon his personal property and choses in action intrusted to or due from a person not an inhabitant of or found within the state, upon the principle that such property is supposed to follow or accompany the person of the owner.

This enactment should not receive a construction that would make it embrace cases over which the court has no jurisdiction; for it could be of no practical importance. Such a suit might at any time be defeated by the parties defendant; or by the interposition of the court, when the facts came to its knowledge. If judgment should in such a suit be rendered against a trustee, and he should make payment thereof to the plaintiff, that would afford him no protection whatever, when called upon in the place of his domicile to pay to the principal defendant.

In the present case it appears from the facts stated in the exceptions that this court has no jurisdiction of the suit between the principal parties. It has obtained no jurisdiction to render a judgment against the principal defendant by his being a citizen or resident, or found within this state, or by his having any property found within it.

The provisions of statute, c. 119, sec. 82, and of the act of February 28, 1845, apply to cases already named of a trustee not at any time an inhabitant of the state, and to cases in which the trustee, after having been summoned, has removed from or can not be found within the state.

The provisions of the seventh section of chapter 119 have reference to cases in which a defendant having a residence within the state is absent from it at the time of service, without having a last and usual place of abode or an agent within the state; and also to cases in which a suit has been commenced against a person not resident or found within the state, whose property has been found within the state and attached in some form.

This would seem to be the appropriate and correct construction of the statutes named; but if it were not the more obvious construction, they should, upon the authority of decided cases, receive such a construction in preference to one that would attempt to give the court jurisdiction beyond the sovereignty of the state: *Buchanan v. Rucker*, 9 East, 192; *Cavan v. Stewart*, 1 Stark. 525. As the court in this case has no jurisdiction over the persons or property of the principal defendant or persons summoned as his trustees, there was no error in the adjudication that the persons summoned as trustees should be discharged.

Exceptions overruled.

JUDGMENT OF COURT WHICH HAS NO JURISDICTION IS VOID: See *Rogers v. Evans*, 52 Am. Dec. 390, note 392, where other cases are collected.

JURISDICTION OF COURTS OF STATE OVER PROPERTY WITHIN ITS LIMITS, authorizing its seizure and sale according to its laws, does not draw to them jurisdiction over the person of the owner residing in another state: *McVicker v. Beedy*, 50 Am. Dec. 666.

JURISDICTION OF STATE COURTS IS LIMITED BY STATE LINES: *Eber v. Coffin*, 48 Am. Dec. 587.

PARTRIDGE v. PATTEN.

[33 MAINE, 483.]

COVENANTS OF NON-CLAIM, AND THAT GRANTOR WILL WARRANT and defend the land conveyed by his deed, free from all incumbrances by him made, do not estop the grantor to claim the land under a title subsequently acquired by him.

VENDOR OF LAND IS NOT ESTOPPED TO ASSERT TITLE SUBSEQUENTLY ACQUIRED, unless by doing so he is obliged to deny or contradict some fact alleged in his former conveyance.

PETITION for partition. The opinion states the case.

Heath, for the petitioner.

Woodman, for the respondents.

By Court, SHEPLEY, C. J. It appears by the agreed statement that John Partridge formerly owned the lot of land one fifth

part of which is now claimed by the petitioner and by the respondents; that Thomas Partridge, a son and heir of John by inheritance, became the owner of one fifth part of that lot, and died seised thereof during the year 1824; that the petitioner, a son of Thomas, became seised of that fifth part, and, on April 12, 1841, conveyed by a deed of release containing the covenants hereafter named, the whole lot to Lewis W. Conner, who conveyed one half of it to each of the respondents; and that Mary Treat, one of the children and heirs of John Partridge, conveyed the one fifth part now in controversy to the petitioner in the month of October, 1841.

The question presented for decision is, whether the petitioner is estopped by the covenants contained in his deed to Conner to assert a title to the fifth part subsequently purchased by him of Mary Treat.

There are but two covenants in that deed; the first is, that of non-claim in the same words as the covenant in the deed considered in the case of *Pike v. Galvin*, 29 Me. 183, and S. C., 30 Id. 539, with an addition of the immaterial words "or their appurtenances."

The reasons were assigned in that case for the decision, that the vendor was not by such a covenant estopped to assert a title subsequently acquired.

The other covenant of the petitioner is in these words: "That I will warrant and defend the same from all incumbrances so far as made by me, but not otherwise."

It does not appear that the petitioner had caused the land described to be in any manner incumbered. That covenant does not assert that the petitioner had any valid title to the lot; nor does it make an engagement to warrant or defend the title against any one not claiming under an incumbrance made by the vendor.

It was stated in the case of *Pike v. Galvin*, that when a deed of conveyance contains no warranty of the title, an after-acquired title will not inure or be transferred to the vendee; nor will the vendor be estopped to assert a title subsequently acquired, unless by doing so he is obliged to deny or contradict some fact alleged in his former conveyance.

The petitioner in this case does not deny or contradict any fact alleged in his conveyance to Conner, by asserting his title acquired from Mary Treat.

WELLS, J. I can not concur in the opinion, for the reasons given by me in the case of *Pike v. Galvin*, 30 Me. 539.

Ordered by the court, that partition be made as prayed for.

The point decided in the case of *Pike v. Galvin*, 29 Me. 183, is, that where one has made a conveyance of land by deed containing no covenant of warranty, an after-acquired title will not inure or be transferred to the vendee; nor will the vendor be estopped to set up his title subsequently acquired, unless by doing so he be obliged to deny or contradict some fact alleged in his former conveyance. The facts in that case, which was a writ of entry, were as follows: Both of the parties derived title from one Ward, who, in 1820, made a contract in writing to convey a tract of land, including the premises in controversy in the case, to one Jellison upon the performance of certain conditions therein stated. Jellison entered into possession, but did not perform the conditions. In 1823, Jellison assigned that contract to the demandant, and at the same time made a deed of release purporting to convey to the demandant the same tract of land. The only covenant in this deed was in these words: "So that neither I, the said Jellison, nor my heirs or any other person or persons claiming from or under me or them, or in the name, right, or stead of me or them, shall or will by any way or means have, claim, or demand any right or title to the aforesaid premises, or any part or parcel thereof forever." In 1825, Ward by a deed containing covenants of warranty conveyed a larger tract of land, including the tract above named, to one Dyer, who in 1829 conveyed to Jellison the tract of land described in the latter's deed to the demandant. In 1833, Jellison conveyed to one Emerson, under whom the defendant claimed title. The demandant had never been in possession of the premises described in his deed from Jellison, but Jellison and those claiming title from Ward through Jellison had always been in possession. As Jellison had no title when he made the deed to the demandant in 1823, the demandant could have none, unless that acquired by Jellison in 1829 inured to him. Shepley, J., who delivered the opinion of the majority of the court, after laying down the proposition above stated, said: "There is an irreconcilable difference in the decided cases respecting this proposition. It is believed, however, to be fully established by the better-considered opinions; and to be in accordance with well-established principles." He then proceeded to show that this proposition is sustained, in Maine, by the cases of *Allen v. Sayward*, 5 Greenl. 227; S. C., 17 Am. Dec. 221; and *Ham v. Ham*, 14 Me. 351; and opposed by the case of *Fairbanks v. Williamson*, 7 Greenl. 96. That in New Hampshire it is sustained by the case of *Kimball v. Blaisdell*, 5 N. H. 533; S. C., 22 Id. 476. That in Massachusetts it is sustained by the cases of *Somes v. Skinner*, 5 Pick. 61; *Blanchard v. Brooks*, 12 Id. 47; *Comstock v. Smith*, 13 Id. 116; S. C., 23 Am. Dec. 670; and opposed by the case of *Trull v. Eastman*, 3 Met. 121; S. C., 37 Am. Dec. 126. That in Connecticut it is sustained by the case of *Dart v. Dart*, 7 Conn. 250. That in New York it is sustained by the cases of *Jackson v. Wright*, 14 Johns. 193; *Jackson v. Bradford*, 4 Wend. 619; *Pelletreau v. Jackson*, 11 Id. 110; *Jackson v. Waldron*, 13 Id. 178; and that it may be considered as opposed by the cases of *Jackson v. Bull*, 1 Johns. Cas. 81, and *Jackson v. Murray*, 12 Johns. 201. Although if they be so considered, they were overruled by *Pelletreau v. Jackson*. And that in Ohio it is sustained by the case of *Kinsman v. Loomis*, 11 Ohio, 475. He then said the only suitable inquiry to be entertained was whether the doctrine asserted in *Fairbanks v. Williamson* could be sustained upon sound principles. The ground upon which that case seemed to be decided appeared to be that the covenant of non-claim, which was the only covenant contained in the deed in that case, was "a covenant real, which runs with the land and estops the grantor and his heirs to make claim or set up any title thereto." After considering the nature of covenants that run with the land, he said: "Admit-

ting the covenant in the deed, alluded to in *Fairbanks v. Williamson*, to be a covenant that might run with the land, it could not run or be transferred by law to the assignee of the grantee, so as to enable him to derive any benefit from it. Nor could it operate in his favor by way of estoppel to prevent circuity of action, for he could maintain no action on that covenant. Nor could it so operate in any other mode, unless there had been found some allegation in the deed by which the releasor had asserted some matter to be true which he must necessarily contradict and deny to have been true, if he would claim to be the owner of the land. In such case he would have been estopped, because the law will not permit one who has in such a solemn manner admitted a matter to be true to allege it to be false. * * * The covenant of non-claim asserts nothing respecting the past or the present. It is only an engagement respecting future conduct." He then showed that one who acquires no title by a release without covenants respecting the title can not recover back the purchase money that he paid for it, and added: "To permit him to acquire a title subsequently purchased by his releasor would often enable him to obtain in another and less direct mode property of more value than the purchase money." He concluded that the doctrine asserted in *Fairbanks v. Williamson* can not on sound principles be admitted, and that the decided cases in this and other states are opposed to it. The learned judge concluded his opinion in these words: "There is no allegation in the deed of Jellison to the demandant respecting the title which it would be necessary for Jellison or his grantee to deny or contradict by setting up a title subsequently acquired. Demandant nonsuit." Wells, J.; delivered a dissenting opinion, which is reported in 30 Me. 539.

AFTER-ACQUIRED TITLE PASSES BY CONVEYANCE WITH WARRANTY: See *Bank of Utica v. Mersereau*, 49 Am. Dec. 189, note 231, where other cases are collected. But see *Barthelemy v. Johnson*, 38 Id. 179.

COVENANTS OF LAWFUL SEISIN IN FEE and good right to convey do not estop the grantor from setting up an after-acquired title against the grantee: *Allen v. Sayward*, 17 Am. Dec. 221.

PALMER v. DOUGHERTY.

[33 MAINE, 502.]

PLAINTIFF IN TRESPASS QUARE CLAUSUM FREGIT NEED NOT MAKE NEW ASSIGNMENT where the defendant pleads the general issue of not guilty to the whole trespass alleged, with or without a brief statement, under the provisions of the statute; but he may give evidence of any act of trespass covered by his declaration.

WHEN LAND IS CONVEYED AS BOUNDED BY STREET REPRESENTED ON PLAN but not yet made, the soil of the contemplated street, though owned by the grantor, does not pass by the conveyance.

GRANT OF LAND BOUNDED BY HIGHWAY GENERALLY carries the fee to the center of the way, if the title of the grantor extends so far.

DEVISE OF REMAINDER OF TESTATOR'S "ESTATE" operates as a devise of the realty.

TENANTS IN COMMON MAY JOIN OR SEVER IN PERSONAL ACTIONS for injuries to the land.

TRESPASS *quare clausum fregit*. The facts are stated in the opinion.

Palmer, for the plaintiff.

N. Abbott, for the defendant.

By Court, HOWARD, J. According to technical rules of pleading, a new assignment, in actions of trespass *quare clausum fregit*, was necessary only where the defendant pleaded soil and freehold, or some other special plea in bar. But where he pleads the general issue of not guilty to the whole trespass alleged, with or without a brief statement under the provisions of the statute, the plaintiff has no occasion to make a new assignment, but may give evidence of any act of trespass covered by his declaration: 1 Saund. 299, note 6; R. S., c. 115, sec. 18.

Where land is conveyed according to a plan taken, the courses, distances, and lines there delineated are regarded, in legal construction, as the description by which the limits of the grant are to be ascertained: *Proprietors of Kennebec Purchase v. Tiffany*, 1 Greenl. 219 [10 Am. Dec. 60]; *Thomas v. Patten*, 13 Me. 329; *Davis v. Rainsford*, 17 Mass. 207. When land is conveyed as bounded by a street, represented on a plan, but not made, the soil of the contemplated street, though owned by the grantor, does not pass by the conveyance: *Southerland v. Jackson*, 30 Me. 462 [50 Am. Dec. 633]. But if he bound the grant by a highway generally, it will carry the fee to the center of the way, if his title extended so far: *Stevens v. Whistler*, 11 East, 51; Com. Dig., Chemin, A, 2; 3 Kent's Com. 433; *Johnson v. Anderson*, 18 Me. 76. David and James Miller, for the purpose of effecting a division of certain lands in Belfast village, owned by them as tenants in common, executed mutual releases of the same date. The former releasing all his right to the lands west of Congress street, and the latter releasing, with other lands, "the following parcels of lands in Belfast, bounded as follows: lying easterly on Congress street, and northerly of the White and Mansfield lots, containing twelve house lots, of a quarter of an acre each, more or less, with the reserve of the two streets contemplated by a plan made by M. Sleeper, Esq." Charles and James streets had been projected on the plan, but had never been made, and to those the language of the deed must have been applied.

It was manifestly the intention of James to release his interest in the lots, and the adjoining land delineated on the plan as the

streets. The expressions, "with the reserve," etc., do not import a reservation to the grantor or releasor, but are used as descriptive of the premises conveyed. By this conveyance David became sole seised of the house lots, and the soil of the contemplated streets. He subsequently devised to Margaret Hodgdon (under grantees of whom the defendant justifies the alleged trespass) the house lots, bounding them by those contemplated streets. By that devise, upon the principles stated, the fee in the streets did not pass. But by a subsequent clause in the will he gave the remainder of his "estate," after payment of his just debts and expenses, to his four children, or their heirs, to be divided equally, with an exception not material to this case. This operated as a devise of the realty: *Barry v. Edgeworth*, 2 P. Wms. 523, note 1; *Ridout v. Pain*, 3 Atk. 486, note 1; *Barnes v. Patch*, 8 Ves. 604; *Wall v. Langlands*, 14 East, 370; *Jackson d. Pearson v. Housel*, 17 Johns. 281; *Pickering v. Langdon*, 22 Me. 413; *Godfrey v. Humphrey*, 18 Pick. 537 [29 Am. Dec. 621]; *Kellogg v. Blair*, 6 Met. 322; 4 Kent's Com. 535; *Holdfast v. Marten*, 1 T. R. 411; *Doe d. Morgan v. Morgan*, 6 Barn. & Cress. 512.

By this devise, James, as one of the children, became seised in fee of one undivided quarter of the land on which the contemplated streets had been projected, as represented on the plan. Afterwards he released by deed of quitclaim all this interest to the plaintiff: R. S., c. 91, sec. 8.

The argument that this conveyance is void for maintenance, is not supported by the facts or the evidence. "Maintenance is commonly taken in an ill sense, and, in general, seemeth to signify an unlawful taking in hand, or upholding of quarrels or sides, to the disturbance or hinderance of common right:" Hawk P. C., par. 1, c. 83, sec. 1.

Tenants in common may join or sever in personal actions for injuries to the land: R. S., c. 129, sec. 17.

According to the agreement, the defendant is to be defaulted.

FEE OF REAL ESTATE, WHEN PASSES BY WILL: See *Bell v. Scammon*, 41 Am. Dec. 706, note 714, where other cases are collected.

GRANT OF LAND BOUNDED BY STREET: See *Van O'Linda v. Lothrop*, 32 Am. Dec. 261, note 265; *Jackson v. Hathaway*, 8 Id. 263, note 266.

JOINDER OF CO-TENANTS AS PLAINTIFFS: See *Lothrop v. Arnold*, 43 Am. Dec. 256, note 259, where other cases are collected.

PRESTON ET AL. v. DREW.

[33 MAINE, 558.]

LEGISLATURE OF STATE MAY DETERMINE THAT ARTICLES INJURIOUS TO PUBLIC HEALTH or morals shall not constitute property within its jurisdiction, where the enactment is to operate prospectively. And a declaration by the legislature that no person shall acquire any property in spirituous liquors intended to be used as a beverage would not violate any provision of the constitution.

ACT OF 1851, FOR SUPPRESSION OF DRINKING-HOUSES AND TIPPLING-SHOPS, does not prevent any person from acquiring or possessing spirituous liquors, except for the uses and purposes therein prohibited, but on the contrary, recognizes them as subjects of property when kept for medicinal or mechanical purposes.

PROHIBITION TO SELL INTOXICATING LIQUORS can not prevent any person from acquiring and possessing them for his own use without any intention to sell them, nor prevent them from being transported from one town or city to another, or through the state, when there is no intention to make sale of them.

WHERE LITERAL CONSTRUCTION OF STATUTE WOULD PRODUCE RESULTS UNJUST and violative of the constitution, the general language of the statute must be restricted so as to accomplish the general intent and declared result of the statute without producing such results, or else it must be declared to be a plain violation of the provisions of the constitution, and therefore void.

REPLEVIN for eight barrels of rum. The defendant justified the taking as an officer under a warrant issued by virtue of the act of 1851, for the suppression of drinking-houses and tippling-shops. The plaintiffs resided in Massachusetts, and sent the rum to Brunswick, in Maine, where it was stored for safe keeping when it was seized by the defendant. The other facts appear from the opinion.

Orr, for the plaintiffs.

Fox, for the defendant.

By Court, SHEPLEY, C. J. The action is replevin of eight barrels of rum. A nonsuit was ordered, *pro forma*, by the presiding judge, that the question might be presented for deliberative consideration whether the action can be maintained. There is no proof presented by the report of the case, that the rum was liable to seizure and forfeiture, or that there was any intention to sell it, in violation of any law of the state.

If the action can be sustained, it must be maintained "for the recovery or possession of intoxicating or spirituous liquors." It is provided by the sixteenth section of the act approved on June 21, 1851, that "no action of any kind shall be maintained

in any court in this state, either in whole or in part, for intoxicating or spirituous liquors sold in any other state or country whatever; nor shall any action of any kind be had or maintained in any court in this state, for the recovery or possession of intoxicating or spirituous liquors, or the value thereof."

Among the rights secured to the people of this state by their constitution, is that of "acquiring, possessing, and protecting property:" Art. 1, sec. 1. The nineteenth section of the same article provides, "that every person, for an injury done him in his person, reputation, property, or immunities, shall have remedy by due course of law."

When a person is deprived of the possession of his property without lawful authority or right, he is injured in his property. The state, by its legislative enactments, operating prospectively, may determine that articles injurious to the public health or morals shall not constitute property within its jurisdiction.

It may come to the conclusion that spirituous liquors, when used as a beverage, are productive of a great variety of ills and evils to the people, both in their individual and in their associate relations; that the least use of them for such a purpose is injurious, and suited to produce by a greater use, serious injury to the comfort, morals, and health; that the common use of them for such a purpose operates to diminish the productiveness of labor; to injure the health; to impose upon the people additional and unnecessary burdens; to produce waste of time and of property; to introduce disorder and disobedience to law; to disturb the peace, and to multiply crimes of every grade. Such conclusions would be justified by the experience and history of man. If a legislature should declare that no person should acquire any property in them for such a purpose, there would be no occasion for complaint that it had violated any provision of the constitution.

The act now under consideration should receive such a construction, so far as it may be possible consistently with established rules of law, as will carry into effect the declared design of its enactment, "the suppression of drinking-houses and tippling-shops." The first section prohibits the manufacture or sale of such liquors, except as thereafter provided. The second section authorizes the appointment of an agent, in any town or city, to sell such liquors, "to be used for medicinal and mechanical purposes." The other sections of the act appear to have been framed to carry these provisions fully into effect, to prevent a violation of them, and to punish persons found to have been guilty of their violation.

While the act provides for the seizure and forfeiture of the liquors designed for sale, in violation of its provisions, no positive enactment is found that no person shall acquire any property in them. Nor is there any language capable of receiving such a construction as would forbid it. The prohibition to sell them can not prevent any person from acquiring and possessing them for his own use, without any intention to sell them. Nor can it prevent their transport from one town or city to another, or through the state, when there is no intention to make sale of them. There is nothing found in the act indicative of an intention to prevent their being property, when thus possessed or used. On the contrary, the act authorizes them to be legally sold and used for certain purposes, and therefore to be the subject of property for such purposes. If they can not be the subject of property, the town or city agents can have no property in them, nor can they or the towns or cities, by any action, obtain redress for their lawless and wanton destruction.

It is, however, insisted in argument, that a person, by the common law, can no more acquire property in spirituous and intoxicating liquors, than he can in obscene publications and prints. There is a clear and marked distinction between them. Such liquors may be applied to useful purposes. This is admitted in the act, by its authorizing their sale for medicinal or mechanical purposes. It is their misuse or abuse alone which occasions the mischief. Obscene publications and prints are in their very nature corrupting, and productive only of evil. They are incapable of any use which is not corrupting and injurious to the moral sense.

Such liquors are also alleged to be a common nuisance, and as such liable to destruction. There is nothing which can be regarded as a nuisance, when considered by itself alone and separate from its use. It is the improper use or employment of a thing which causes it to become a nuisance. It would be not a little absurd to declare that to be a nuisance, and as such liable to be abated and destroyed, which the act allows to be sold and purchased as an article useful for medicinal and mechanical purposes.

The court can not decide by an application of the rules of the common law, or by the provisions of the act, that property can not be acquired in spirituous and intoxicating liquors. The language of the act, which declares that no action shall be maintained for the recovery or possession of such liquors or their

value, is without limitation; and by a literal construction, it would deprive one who has purchased them of a town or city agent, for allowable purposes, of the right to maintain an action to recover them or their value from a person who had taken them from his possession without any right or authority, or who had wantonly destroyed them. It would also deprive the town and city agents of all right to maintain an action for the recovery of such liquors which had been purchased by them, for sale according to the provisions of the act, and which had been unlawfully taken from them or destroyed. It would also deprive a person of all remedy for the protection of such property by action, when procured for his private use and not intended for sale; and when he was carrying it through the state without any intention of sale in this state. Can one conclude that an intelligent legislature could have intended to hold out such temptations for the lawless subtraction or destruction of private property? The results are too extraordinary and unjust to allow an intelligent and considerate mind to believe that they could have been foreseen and approved.

The general language must, therefore, be restricted so as to accomplish the general intent and declared purpose of the act, without producing such results, or the provision, now under consideration, must be pronounced to be a plain violation of the provisions of the constitution and void. The general intent and declared purpose of the act would in no degree be infringed by regarding the general language to be so limited as to forbid the maintenance of any action for the recovery or possession of such liquors or their value, which were liable to seizure and forfeiture, or intended for sale in violation of the provisions of the act.

It may be said, that a court of justice is not authorized to introduce by construction such a limitation; that it savors more of legislation than of construction. It may be so; and if the court may not introduce any such limitation without encroaching upon the forbidden province of another department of the government, it can not omit its duty to declare that provision to be in violation of the provisions of the constitution, and void.

Nonsuit set aside, and a new trial granted.

INTOXICATING LIQUORS, POWER OF STATE TO REGULATE SALE OF: See *Commonwealth v. Kimball*, 35 Am. Dec. 326, note 331 et seq., where this subject is discussed.

LEGISLATURE MAY REGULATE MANNER OF ENJOYING PROPERTY, where the public interests are affected by general laws operating alike on all citizens: *Mayor etc. of Mobile v. Yuille*, 36 Am. Dec. 441.

STATUTE WILL BE SO CONSTRUED AS TO HARMONIZE WITH CONSTITUTION if possible: *Bailey v. Philadelphia, W. & B. R. R. Co.*, 44 Am. Dec. 593.

STATUTE EXTINGUISHING EXISTING REMEDIES, and leaving no redress for the violation of a contract, impairs its obligation, and is void: *Bruce v. Schuyler*, 46 Am. Dec. 447.

LEGISLATURE CAN NOT PROHIBIT PERSON FROM ACQUIRING or possessing any particular species of property: *Stevens v. State*, 35 Am. Dec. 72.

THE PRINCIPAL CASE IS CITED in *Nichols v. Valentine*, 36 Me. 326; *Jones v. Fletcher*, 41 Id. 257; *Dolan v. Buzzell*, Id. 474; and *Lord v. Chadbourne*, 42 Id. 442, to the point that, notwithstanding the act of 1851, an action may be maintained for liquors, when not liable to seizure and forfeiture, or intended for sale in violation of law.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

MUDD, ADM'X, v. HARPER.

[1 MARYLAND, 110.]

RIGHT OF ACTION OF INDORSEE OF NEGOTIABLE INSTRUMENT is perfect against all the parties on the maturity thereof, when demand has been made and notice of non-payment given, as required by the law merchant. **INDORSEMENT OF BILL AFTER MATURITY IS EQUIVALENT** to drawing a bill at sight.

PROMISSORY NOTE IS NEGOTIABLE AS WELL AFTER AS BEFORE IT BECOMES DUE.

NOTE OR BILL PAYABLE ON DEMAND MUST BE PRESENTED, or at least put in circulation for that purpose, within a reasonable time after it has been received.

WHAT IS REASONABLE TIME IS QUESTION OF LAW except in very particular cases, when it is a mixed question of law and fact.

REMEDY ON DEBT FOR WHICH NOTE IS TAKEN IN PAYMENT is suspended until maturity of the note.

HOLDER OF NOTE TAKEN IN PAYMENT OF PRECEDENT DEBT, at the maturity of the note, may, at his election, proceed either on the note or on the original cause of action.

IT IS NOT INDORSEE'S DUTY TO MAKE DEMAND AND GIVE NOTICE on the day he receives a note payable on demand, but he has a reasonable time for that purpose.

STATUTE OF LIMITATION DOES NOT BEGIN TO RUN AGAINST INDORSEE of promissory note, payable on demand, until the expiration of a reasonable time after he receives the note within which he may make demand and give notice.

SUIT BY INDORSEE AGAINST INDORSER, BROUGHT THREE YEARS AND FIVE MONTHS after the indorsement, and conveying to the defendant the only notice of demand upon the makers which he has received, is not a notice within reasonable time.

SUIT BROUGHT BY INDORSEE AGAINST MAKERS OF NOTE is not adequate evidence of a sufficient demand, and of notice within proper time to the indorser.

PROCEDENDO WILL NOT BE AWARDED, THOUGH PLAINTIFF BELOW REVERSE JUDGMENT, if the plaintiff's right of recovery is barred by the statute of limitations.

ASSUMPSIT on a promissory note. The opinion states the case.

Causin, for the appellant.

Magruder, for the appellee

By Court, LE GRAND, C. J. This is an action of *assumpsit*, instituted on the fifteenth day of September, 1846, against the defendant as the indorser of a promissory note. The plaintiff proved that the defendant was indebted to her intestate, as administrator of John A. Turton, and in part payment of a debt due by defendant, passed by indorsement to him a note of William and Washington Hilleary, payable on demand to Samuel Sprigg, or order, and which the defendant held by the indorsement of Sprigg. The plaintiff's intestate, at the first term, brought suit against the Messrs. Hilleary, obtained judgment, and sued out a *fi. fa.*, which was returned *nulla bona*. The plaintiff then brought this action against the defendant. The precise time when the note was indorsed to plaintiff's intestate does not appear, but it was before the twenty-fifth day of March, 1843, and in part payment of a precedent debt. The declaration, in addition to special counts on the note, contains the usual money counts. The defendant pleaded *non assumpsit* and limitations. On this state of facts, the court below instructed the jury, "that if they found from the evidence that the note referred to in the plaintiff's declaration was indorsed to the plaintiff's intestate, as executor of John A. Turton, more than three years before the institution of this action, then the action is barred, and the plaintiff is not entitled to recover."

Before proceeding to dispose of the other questions involved in the case, it may be remarked, that it does not appear from the evidence what was the character of the debt for which the note in question was given in part payment. To have been recovered on under the declaration, in this case, it must have been a simple contract debt, and therefore, in the absence of all proof of a new promise, so much of it as was not covered by the note was clearly barred by the statute of limitations.

It is urged on behalf of the defendant that the plaintiff had no right of action against him, on the original debt, or on the note indorsed to her intestate, until the return of the *nulla bona* in the case against the makers, and to sustain this view several cases in Virginia have been relied on. These cases undoubtedly

put promissory notes on the same footing with assigned bonds, and deny to an indorser all right of action against the payee until the remedy against the maker is completely exhausted. It does not appear from the report of these cases whether they were decided in pursuance of some local statute or not, but it is fair to presume they were, because if they were not, they are in opposition to the decisions in England and our sister states in which (as has been uniformly the case in Maryland) the right of action of an indorsee is perfect against all the parties on the maturity of the note; that is, when demand has been made and notice of non-payment given as required by the law merchant.

The note in this case was payable on demand, and was some four months old when indorsed to the plaintiff's intestate. According to our apprehension, the principles governing it are very simple and well defined.

The indorsement of a bill after it becomes due is equivalent to the act of drawing a bill at sight: Ch. Bills, 242. A promissory note is negotiable as well after as before it becomes due: *Annan v. Houck*, 4 Gill. 331 [45 Am. Dec. 133]. And where a note or bill is payable on demand, it must be presented, or at least put in circulation for that purpose, within a reasonable time after it has been received: Ch. Bills, 402.

Except in very particular cases, when it is a mixed question of law and fact, what is a reasonable time is a question of law.

Now this action was not brought until more than three years and five months after the indorsement under which plaintiff claims, and the bringing of this suit is the only evidence affecting defendant, so far as this court is informed, of notice to the indorser that a demand had ever been made of the makers. There is no evidence in the record of the residence of the makers, but it is admitted by counsel that all the parties to the note live in Prince George's county. Under such circumstances it can not be contended that a demand was made and notice given within a reasonable time. But it is said the suit brought against the makers is adequate evidence of a sufficient demand, and of notice within a proper time to the indorser. We do not concur in this view. It is true that there are cases in which it is perfectly apparent, from the agreement of the parties, or the peculiar circumstances of the case, that it was the intention of the parties to a note payable on demand, that it should not be presented for payment according to the law merchant, a longer time will be allowed for the demand and notice, and the cases of *Vreeland v. Hyde*, 2 Hall, 429, and *Van Hoesen v. Van Alstyne*,

3 Wend. 75, are of that nature. But the case before us is not of such character. There is nothing in the record which shows the indorsee was relieved from the obligation to make the demand and gave notice within a reasonable time. There is nothing to show there was such an agreement, nor that there was anything in the place of residence of the parties to make it either impossible or inconvenient. It has been expressly held that where a note payable on demand is negotiated in the ordinary way, without any agreement or understanding among the parties as to the time when it is to be paid, and all the parties reside in the same city, seven months is not a reasonable time. In the case of *Martin v. Winslow*, 2 Mason, 241, Justice Story says: "I have no hesitation in saying that a note payable on demand must be demanded within a reasonable time, otherwise the indorser is discharged. What shall constitute a reasonable time is not a matter of absolute certainty, as to which a definite rule can be laid down. It must depend on circumstances. But unless there be circumstances in the case which account for the delay, a neglect to demand payment of such a note for more than seven months is unreasonable delay, and discharges the indorser. If the fact of such delay for such a length of time appear naked of all circumstances, it is a discharge of the indorser. And the onus to establish any justification or excuse for such delay lies on the plaintiff. It makes no difference in the case that the indorsement was in lieu of a former security."

But it is said the taking of the note in question suspended all action on the original debt, until the remedy was exhausted against the makers, and as a consequence, the statute of limitations could not begin to run against the original claim until the return of *nulla bona*, in the case against the makers. It is true that where a note is taken in payment of a precedent debt, the remedy on such debt is suspended until the maturity of the note: *Glenn v. Smith*, 2 Gill & J. 493 [20 Am. Dec. 452]. But it is equally true, that when the note becomes due, the holder may, at his election, proceed either on the note or the original cause of action; and it is also true, that if the indorsee neglects to make the proper demand and give the proper notice to the indorser (if the latter be the original debtor, but not the original payee), the right of recovery of the indorsee is gone, both on the note and the original cause of action. The only difference in such case between the indorsement of a note before due and one payable on demand is, that in the latter instance, the indorsee has a reasonable time to make the demand after the

note comes into his possession; that is, he is not bound to make it on the day on which he gets possession of the note. But in both cases demand and notice of non-payment are necessary to give the indorsee a right of recovery on the note: *Greeley v. Hunt*, 21 Me. 455; *Colt v. Barnard*, 18 Pick. 260 [29 Am. Dec. 584]; *Kirkpatrick v. McCullough*, 3 Humph. 171 [39 Am. Dec. 158]; *Gray v. Bell*, 2 Rich. L. 67 [44 Am. Dec. 277].

From these views it appears, this court is of opinion, the plaintiff's intestate could, on the very day on which he received the note, have made a demand on the makers, and on their refusal to pay, have given notice to the defendant, and thus have secured to himself the right to have brought suit on the note, or on the original cause of action.

We do not, however, concur with the court below in the instruction given to the jury. The county court, by its direction, decided in effect, that it was the duty of the indorsee, on the day he received the note, to have made the demand and given the notice, for they held the statute of limitations commenced to run from that day.

This we think was error, because the indorsee was entitled to a reasonable time after he became possessed of the note to make the demand and to give the notice. But inasmuch as the plaintiff's right of recovery is barred by the statute, although we reverse the ruling of the court below, we will not send the case back under a *procedendo*: See *State, Use of Johnson, v. Green*, 4 Gill & J. 381; *Berry v. Harper*, Id. 467.

Judgment reversed and *procedendo* refused.

NEGOTIABILITY OF NOTE AFTER MATURITY.—Indorsee of note negotiated after maturity holds it subject to all the equities between the original parties, whether he have notice thereof or not: *Comstock v. Draper*, 53 Am. Dec. 78, and note citing prior cases. Dishonored negotiable note remains negotiable, and subsequent indorsement has the same effect as an indorsement before due, except that a demand must be made in a reasonable time to charge the indorser: *Leavitt v. Putnam*, Id. 322, and note citing prior cases.

DILIGENCE NECESSARY IN MAKING DEMAND AND GIVING NOTICE: See *Orear v. McDonald*, 52 Am. Dec. 703, and *Whitaker v. Morrison*, 44 Id. 627, citing prior cases. The principal case is cited in *Dixon v. Clayville*, 44 Md. 580, to the point that in order to hold the indorser of a demand bill, demand must be made upon the drawer, and notice given the indorser within a reasonable time after the indorsement.

RIGHT OF ACTION ON NOTE ACCRUES IMMEDIATELY ON DEMAND AND REFUSAL on the last day of grace: *Staples v. Franklin Bank*, 35 Am. Dec. 345.

SEASONABLENESS OF DEMAND AND NOTICE, WHEN QUESTION OF LAW, and when of mingled law and fact: See *Duggan v. King*, 33 Am. Dec. 107; *Bank of Utica v. Bender*, 34 Id. 281; *Ransom v. Mack*, 38 Id. 602; *Whitaker v. Mor-*

rison, 44 Id. 627; *Godley v. Goodloe*, 45 Id. 287; *Harrison v. Crowder*, Id. 290, and cases cited in the notes.

NOTE PAYABLE ON DEMAND BECOMES DUE FROM ITS DATE, and no express demand is necessary prior to commencing action, which in itself is a demand: *Smith v. Bythewood*, 33 Am. Dec. 111.

STATUTE OF LIMITATIONS RUNS FROM DATE OF DEMAND NOTE: *Smith v. Bythewood*, 33 Am. Dec. 111; *Wenman v. Mohawk Ins. Co.*, 28 Id. 464, collecting prior cases in the note.

PROCEEDENDO WILL NOT BE AWARDED IF PLAINTIFF CAN NOT RECOVER ON EVIDENCE: *Stockton v. Frey*, 45 Am. Dec. 138.

BEALL v. HILLIARY.

[1 MARYLAND, 186.]

EXECUTOR CAN NOT MAINTAIN SUIT IN EQUITY TO COMPEL CO-EXECUTOR TO ACCOUNT for and pay over to him or into court certain claims alleged to be due from defendant to the testator's estate.

AT COMMON LAW DEBT DUE FROM EXECUTOR TO TESTATOR was considered paid and was assets in the hands of the executor, for which he was as much answerable to the creditors of the testator as if he had actually received that amount in cash from any other person indebted to the estate.

EXECUTOR IS ACCOUNTABLE IN EQUITY FOR AMOUNT OF HIS DEBT as assets, not only for the payment of debts, but also for the benefit of residuary legatees.

EXECUTORS ARE NOT LIABLE TO EACH OTHER, but each to the *cestuis que trust* to the full extent of the funds he receives.

ONE EXECUTOR PAYING OVER TO OTHER WHOLE OF ASSETS IN HIS HANDS will not be thereby exonerated from his responsibility to the creditors and others entitled to the estate of the deceased.

RIGHTS OF ONE EXECUTOR ARE FULLY EQUAL TO THOSE OF OTHER in regard to receiving, holding, and disbursing the assets.

EXECUTOR WHO HAS PAID AMOUNT OF DECREE IS ENTITLED TO DEMAND of his co-executor so much of the decree as he was rightfully bound to pay.

OBJECTION THAT PLAINTIFF HAS NO CAUSE OF ACTION may be urged on appeal.

APPEAL from decree in equity in favor of complainant and appellee. The only question involved was whether the suit could be maintained as appears from the opinion.

T. J. McKaig and McMahon, for the appellant.

Pearre, for the appellee.

By Court, ECCLESTON, J. The parties were executors of B. Tomlinson, deceased, and this suit was instituted for the purpose of compelling the appellant to account for, and to pay

over to the appellee or into court, certain claims alleged to be due by the appellant to the testator. The appellant denies that he is indebted. And the first question presented in argument is, whether such a suit can be sustained, assuming that at the decease of the testator the appellant was indebted to him in the manner set forth in the original and supplemental bills.

It was long since the settled doctrine in England, that if a creditor appointed his debtor his executor, the debt was considered extinguished at law, for the reason that the executor could not sue himself. Not only did this principle prevail when there was a sole executor, but also if there were two, and one of them a debtor to the estate. As a consequence of this, it was held that the debt was paid, and was assets in the hands of the executor who owed the money; for which he was as much answerable, to the creditors of the testator, as if he had actually received that amount in cash from any other person indebted to the estate: 2 Williams on Ex., 3d Am. ed., 1124, 1126. At a later period in equity, it became an established rule, that an executor should be accountable for the amount of his debt, as assets, not only for the payment of debts, but also for the benefit of residuary legatees and next of kin: Id. 1128. Still recognizing the principle, that the executor has paid to himself the debt due by him to the testator. Thus entirely dispensing with any necessity for a suit to make the debt of an executor available as assets.

But independently of there being no necessity for a suit by one executor against his co-executor, to compel the payment of a debt due by him to the testator, it would be directly in conflict with the rights and powers of executors over the assets. Each, without the concurrence of the other, possesses full authority to receive debts due to the testator; to give acquittances for the same; to make disbursements in the payment of debts; to sell a personal chattel, or leasehold for years, belonging to the testator; and to give receipts for the purchase money: Ram on Assets, in 8 L. L. 329, 330. And in *Edmonds v. Crenshaw*, 14 Pet. 169, the supreme court say, that executors "are not liable to each other, but each to the *cestuis que trust* to the full extent of the funds he receives." This case also establishes the principle, that if one executor pays over to the other the whole of the assets in his hands, this will not exonerate the one so paying from his responsibility to the creditors and others entitled to the estate of the deceased. Believing these to be well-settled principles, we can not assent to the doctrine contended for on

the part of the appellee. Instead of tending to promote the settlement of estates in the most expeditious and economical manner, it would produce quite the opposite effect.

It can not be denied that the rights of one executor are fully equal to those of the other, in regard to receiving, holding, and disbursing the assets. If therefore A. has the right to sue B., and recover from him a debt which he owed to the testator at the time of his decease, and which, by the operation of law, is paid, and in the hands of B., and equally subject to the claims of creditors, legatees, and distributees, as any other debt he has actually received from a debtor to the estate, it must necessarily follow that B. would be entitled to sue and recover from A. any debt which he had received. And according to this theory, there is no reason why B. should not be able to compel A. to pay back the money which B. had just been obliged to pay.

In support of the appellee's right to sue, several authorities have been referred to, which we propose to notice.

In 2 Williams on Ex. 1625, it is said, that "although an executor can not bring an action at law against a co-executor, yet in a court of equity one executor may sue another." The reference in support of this position is to *Allen v. Story*, Toth. 150. In the edition of 1820 this case is not on page 150; but on page 86 will be found the following statement: "One executor may sue another in this court, though not at law: *Allen v. Story*, in 1585; and *O'Kely v. Barnard*, 39 Eliz." What particular or special equitable circumstances may have existed in those cases, we are not informed. It may be that the executors sued, had become insolvent, or were fraudulently colluding with the debtors to the estate, by giving receipts and releases, without receiving payment, or they may have been squandering the assets in some other way instead of properly applying them to the discharge of the claims of creditors. Such a loose and unsatisfactory statement as this can have but little influence upon the question before us, especially as the authority of Tothill is very much shaken in our estimation by the strong remarks of the distinguished Chancellor Kent in *King v. Baldwin*, 2 Johns. Ch. 558, 559. On the latter page, the chancellor says: "This explanation of two cases is sufficient to show what little reliance is to be placed upon the loose notes of Tothill, which were collected and alphabetically arranged by him, in the shape of an index; and published after his death."

In the case of *Rowe v. Billing*, Toth. 89, it is stated that "two executors being decreed to pay legacies and debts, the one pay-

ing it, the other shall, upon a bill, be compelled to pay the moiety and costs."

When in England, under a bill filed by creditors or legatees, the executors are called to an account in equity, the whole estate is there settled, and the amount due from the executors is ascertained. After one of them pays that amount, there can be no doubt of his right to compel the other to pay his share of that sum. There is no longer any necessity for maintaining the right of the delinquent executor, to retain the assets for the purpose of disbursing them among the creditors and other claimants, for all such claims have been adjusted; and the executor who has paid the amount of the decree is entitled to demand of his co-executor so much of the decree as he was rightfully bound to pay but did not.

The case of *Lucas v. Seale*, 2 Atk. 56, is also referred to in 2 Williams on Ex. 1625. In that case one of the executors had given a mortgage to the testator, on which the bill was filed by the other executors for a foreclosure. It was held that the application ought to have been for a sale of the estate, and not for a foreclosure, because the appointment of the mortgagor as an executor gave him an interest in the mortgage.

According to the report by Atkins, the bill appears to have been filed because the complainants were apprehensive that the mortgagor was insolvent; and that the mortgaged premises might prove insufficient for the payment of the claim. This case is more fully reported in West's Chancery Reports, 556, where it is stated in note 1 to have been "taken from a manuscript report of Mr. Forrester, which agrees with the same case in Lord Hardwicke's note-book." Seale, the defendant, gave a mortgage to Elizabeth Gee for five hundred pounds, who devised the mortgaged premises to the plaintiffs and defendant, and appointed them her executors. The bill was filed by plaintiffs to compel the defendant to redeem; and if the mortgaged estate proved insufficient to pay the claim, that the defendant should make up the deficiency. The master of the rolls referred it to the master to ascertain the amount due, and if paid, the plaintiffs were to reconvey; but in case of non-payment there was to be a foreclosure and sale of the mortgaged premises; and if the proceeds of sale would not satisfy the claim, the defendant was to pay the balance.

The lord chancellor reversed this decree, because it went too far; and directed an inquiry to ascertain whether the mortgage was a good security, reserving all further directions. In decid-

ing this case it was held by him, that "when a person is co-executor and debtor, the money is assets in his hands." And also that he can not be compelled to pay the money to his co-executors, except under special circumstances.

In the case of *Ex parte Brown*, 1 Deac. & Ch. 118, it will be seen that if one of several executors becomes bankrupt, and before the bankruptcy he receives a portion of the assets, the other executors can obtain an order to prove the amount under the commission. But in *Clarke v. Cotton*, 2 Dev. Eq. 55, 56, it is doubted whether even in a case of insolvency of one executor, the other can sue him in equity. It is not, however, incumbent on us to decide that question, as there is no charge of insolvency in the present suit.

In 1 Spence's Eq. Jur. of the court of Chan. 585, the right of one executor to sue another is asserted in general terms, and the reason assigned is, "because the matter is testamentary."

Reference is made to Tothill, as in 2 Williams on Ex., and also to the calendars in temp. of Henry VI., etc. We have not been able to see the calendar, and are therefore entirely without information as to the nature of the cases there to be found. In note E, on page 578 of 1 Spence, the subject of one executor filing a bill against another is introduced; and upon the authority of the calendars in temp. of Henry VI., etc., it is said such bills were frequently filed. None of the circumstances in the cases alluded to are given, except in regard to one. There, it appears "one of the executors, in collusion with a debtor to the estate, released him, so that there were not sufficient assets of the testator to answer the purposes of the will." The bill was filed against the executor and debtor. The main point in the case seems to have been, whether the release, although without consideration, was not a full discharge of the claim. The object of the bill must of course have been to compel the original debtor to pay the claim, notwithstanding the release. Although the transaction was of a fraudulent character, the chancellor gave leave for a second argument; but no decision was made. Why so, or how the case was disposed of, does not appear.

That the principle stated by Williams on Executors and Spence is correct, there can be no doubt, under certain circumstances. But because one executor may sue another in some cases, it does not follow, as a necessary consequence, that the case before us is one in which it may be done.

In *Saunder's Heirs v. Saunder's Ex'rs*, 2 Litt. 815, the heirs and devisees filed a bill in equity against the executors, to com-

pel a settlement of the estate. Gatewood, one of the executors, claimed title to certain negroes in right of his wife, alleged by the complainants to constitute part of the estate of the deceased. To prove his right to the negroes, Gatewood produced in evidence the record of a judgment, in an action of detinue, instituted in the name of Gatewood and wife, against himself and the other two executors. Whether this record could be admitted as concluding the title, is the point discussed in that part of the opinion of the court to which we were particularly referred, and will be found on pages 320 and 321.

In deciding against the record, the court say: "The law knows of no such action, and the only redress that one could have under such circumstances is a suit in equity, to which the devisees, as well as the other executors, might be made parties, and a decree obtained, quieting the claim, exempting the executor claiming from holding the estate in his fiduciary character, or accounting for the property." It is therefore apparent, that the real point before the court was, whether the record in detinue was available for the claimant under it. And what the court said as to a suit in equity was an *obiter dictum*. But admitting that to have been a question directly in issue, it is not perceived how it could operate in favor of the pretensions of the complainant, in the case now before the court. There is nothing to sanction the right of one executor to sue for and obtain from another any portion of the assets belonging to the estate. The proceeding recognized by the court as proper would be to prevent not only the co-executors, but the other parties having an interest in the estate, from compelling an executor to give up property supposed to belong to the estate, but which he claimed as his own. And the court take care to say, that in such a suit the devisees should be parties as well as the executors. So that if the decree should establish the right of the claiming executors, it would bar the devisees and discharge all the executors from further responsibility, on account of the property, in their fiduciary character.

In this opinion, immediately following the remark in regard to the suit in equity, the court recognized the doctrine we have previously stated, "that executors, however numerous, are considered in law as one representative; and each has full power over the estate of the decedent." If so, how can one claim from another the assets in his hands, in a case like the present?

In *Stiver v. Stiver*, 8 Ohio, 217, the suit was in equity, by a surviving administrator, against the heirs and administrators *de*

bonis non of a party, who with the complainant had been joint administrator of the original intestate. It appears clearly that a portion of the assets were in the hands of the deceased administrator, among which was a note given by himself.

That under such circumstances the surviving administrator would have the right to claim the assets from the representatives of the deceased administrator, may perhaps be true. On the decease of one of two executors or administrators, the trust is vested in the survivor, who then has a right to the possession and disbursement of the assets. But such a case is very different from the present.

Simmons v. Gutteridge, 13 Ves. 262, is a case in which legatees filed a bill calling upon the executors to account. Application was made to have an interrogatory propounded to one of the executors, inquiring whether he did not owe a debt to the testator. The application was refused by the master, but granted by the lord chancellor, who places the right to the interrogatory upon the ground of its being at the instance of a defendant, "having the fixed ascertained character of legatee," which would seem to exclude the idea that a co-executor, in that character alone, would have been entitled to the interrogatory, unless under circumstances of special equity.

The jurisdiction of a court of equity in testamentary affairs is asserted in 1 Story's Eq. Jur., secs. 534, 543, 544. The last of these sections shows that an executor may call the creditors into equity for the purpose of having their claims adjusted and settling the order and payment of the assets, when he finds the affairs of the testator in a complicated and embarrassed condition, so that he can not safely administer the estate without the aid of the court. But in none of the sections of this learned and comprehensive treatise on equity jurisprudence, to which we have been referred, is it anywhere asserted that one executor can sue his co-executor for a debt due by him to the testator.

After a careful examination of the authorities relied upon in argument on the part of the complainant, we do not think they establish his right to maintain this suit. There is here no allegation of insolvency, or of any fraudulent or wanton wasting of the assets, or any special grounds of equity, which can justify such a proceeding.

In *Clarke v. Cotton*, 2 Dev. Eq., 51 an effort was made to charge several executors with a sum of money due by a co-executor to the testatrix; which co-executor had become insolvent after

proving the will. The effort, however, was unsuccessful; and the court say: "This being a debt from the executor himself, due to the testatrix in her life-time, became assets in the executor's hands, upon her death, for the satisfaction of creditors and legatees. If he had paid it to the other executor, it would not have excused him to the creditors; and there ought, therefore, to be no means of compelling such a payment."

In none of the authorities, where the facts are set forth, so as to afford an opportunity of forming an opinion as to the circumstances, have we met with a case which would justify a decree in favor of the complainant.

And in this state there is no necessity for now introducing such a principle as a decree of that description would establish. For if a joint administrator or executor apprehends a loss from the neglect or misconduct of his co-administrator or co-executor, he may apply to the orphans' court, and obtain a revocation of the powers and authority of the delinquent party, if the court are satisfied that the apprehension is well founded.

And the orphans' court have power "to enforce by attachment and commitment, if necessary, the surrender and delivery to the remaining executors or administrators of the assets of the estate, and of all books, accounts, papers, and evidences of debt of the estate that may be in the possession or control of the person so dismissed from the administration." And authority is given to the remaining executors or administrators, by an action on the case, to recover for any loss or damage they may be subject to or suffer, by the executor or administrator, whose powers shall have been revoked: See act of 1816, c. 203, sec. 4.

But it has been contended that the objection to the appellant's right to recover in this suit is an objection to the jurisdiction of the court below, and was made too late. We do not think so. It is by no means clear that if it was properly a question of jurisdiction, the objection was not in time. The defense set up is not based upon the ground that the complainant, having a right of action, has sought redress in the wrong tribunal. It is that whilst the authority of the defendant, as an executor, continues unrevoked, the appellant has no right to maintain such a suit as this, and indeed has no cause of action against him in any court.

After deciding this point in favor of the appellant, it is unnecessary to say anything in reference to the various matters of account set forth in the proceedings.

This court will therefore sign a decree reversing the decree of

the county court and dismissing the bill, with costs to the appellant.

Decree reversed.

EXECUTOR NOT LIABLE FOR CO-EXECUTOR'S DEVASTATION unless he has contributed thereto: See *Cameron v. The Justices*, 44 Am. Dec. 636, and cases cited in the note. The remedy is with the heirs and distributees: *Stubblefield v. McRaven*, 43 Id. 502.

POWERS OF CO-EXECUTORS AND CO-ADMINISTRATORS.—One of two administrators or executors may sell the whole of decedent's property: *Beecher v. Buckingham*, 44 Am. Dec. 580, and note citing other cases. Power given to executors jointly can not be exercised by one alone: *Brown v. Hobson*, 13 Id. 187; *Floyd v. Johnson*, Id. 255. Sales made by less number of executors than those appointed by will are valid: *Taylor v. Galloway*, Id. 605; *Miller v. White*, 1 Id. 591; *Zeback v. Smith*, 5 Id. 352; *Marr v. Peay*, Id. 521; *Nelson v. Carrington*, 6 Id. 519. Equity will supply defect in execution of power in favor of a *bona fide* purchaser: *Roberts v. Stanton*, 5 Id. 463. In *McCann v. Sloan*, 25 Md. 587, the principal case is cited upon the point that executors are trustees with more than ordinary powers, for one may sell or convert the whole estate without the consent of the others.

EXECUTOR OR ADMINISTRATOR HAVING ADVANCED MONEY TO ESTATE IS SUBROGATED to rights of creditors whose debts he has paid: *Williams v. Williams*, 22 Am. Dec. 729; *Kinney v. Harvey*, 21 Id. 597.

PRICE ET AL., AD'MRS, v. McDONALD ET AL.

[1 MARYLAND, 403.]

EQUITABLE CLAIM FOUNDED ON UNRECORDED DEED WILL BE ENFORCED IN EQUITY, except against a *bona fide* purchaser without notice.

INFORMATION GIVEN TO PURCHASER WHICH OUGHT TO PUT HIM ON INQUIRY is sufficient notice in equity.

PARTY WILL BE CHARGED WITH NOTICE OF CONTENTS AND EFFECT OF INSTRUMENT which actually affects the land conveyed to him, and which without doubt includes that land, if, after becoming aware of its existence, he fails to make suitable inquiry, notwithstanding that the party whose interest would prompt him to misrepresent should inform him that the incumbrance was paid off or discharged without, however, furnishing any proof of that fact.

STATEMENTS IN ANSWER RESPONSIVE TO BILL ARE TO BE TAKEN AS TRUE. NOTICE PRIOR TO PAYMENT OF PURCHASE MONEY WILL BIND PARTY as effectually as if received before purchase.

BILL in equity. The bill was dismissed by the court below, and this appeal was prayed. The opinion states the case.

Price, for the appellants.

McKaig, for the appellees.

By Court, EGGLESTON, J. The instrument on which this suit is founded bears date the twenty-first of November, 1808, and

was executed as a deed of trust, or mortgage, for the purpose of conveying certain lands to Henry Dangerfield, by John McDonald, in trust, to secure the payment of the sum of four hundred and fifty-three dollars and eighty-five cents to William McGuire; giving the trustee power to sell the land and pay the claim, provided it should not be paid on or before the twenty-first of November, 1811. On the fifth of September, 1817, after the decease of Henry Dangerfield, the original bill was filed, praying for the appointment of a new trustee, and for the sale of the land, to pay the claim.

In the original bill, William McGuire was complainant, and John McDonald the only defendant. On the sixteenth of April, 1823, after the decease of William McGuire, his administrator, William Naylor, filed a bill of revivor, in which it was stated that the interest of John McDonald in the land included in the deed of trust, had been sold by George Bruce, as sheriff of the county, and by McDonald to John Folck; and that Andrew Bruce, as sheriff, had sold the same land to William Harness. The said John Folck, William Harness, George Bruce, and Andrew Bruce were made parties.

In April, 1825, an amended bill was filed, alleging that John Folck had knowledge of the deed of trust, that he was told of it by John McDonald, and that he consulted an attorney at law about the deed; that he purchased the land from the sheriff, after taking advice in regard to the deed; that after the land was struck off to him, and before he paid for it, he was informed that such a paper purporting to be a deed of trust, existed. Notwithstanding which information, he paid the money, and took a deed from the sheriff, subject to the claim of William McGuire. And that the circumstances of the deed of trust were known to Folck and the sheriff, before Folck bought the land.

In the argument it was admitted by the solicitor for the appellants, that he must abandon all claim to any benefit from the *lis pendens*, in consequence of the exceedingly dilatory manner in which this case was conducted. It is therefore unnecessary to make any reference to what is said in the amended bill, or in the answers, in relation to a knowledge on the part of Folck as to the pendency of this suit, at the time of his purchase.

By an agreement filed, it is admitted that the land sold to Harness is no part of the land included in the deed of trust; and his answer is not sent up in the record.

On the twenty-fourth of April, 1827, John Folck filed his answer, in which he alleges that he had no personal knowledge of the execution of the deed of trust from John McDonald to Henry Dangerfield, mentioned in the bill. He admits that he purchased all the right, title, and interest of John McDonald in and to a tract of land at sheriff's sale, which land he believes to be the same land conveyed by deed from McDonald to Dangerfield. He admits also that he had heard some person or persons, whose names he does not recollect, speak of the existence of this deed of trust before his purchase; but he asserts that he has no recollection of his ever having taken counsel about the effect and operation of the deed of trust prior to the sale; and that he had no knowledge of the existence of the deed before his purchase, except that collected from the conversation above mentioned. He states that on the day of the sale of McDonald's interest in the land he purchased the same at the instance of McDonald and George M. Swann; that on the same day, and just prior to the sale, he (Folck) inquired of Bruce, the sheriff, if any such deed of trust from McDonald to Dangerfield did exist, and Bruce informed him that he had no knowledge of any such deed; that then the land was offered for sale, and he (Folck) became the purchaser. He denies that John McDonald ever did, at any time before the sale of the land, disclose the existence of any such deed of trust; but admits, that shortly after the sale, and before the payment of the purchase money, John McDonald did inform him of the existence of such a deed. He states, however, that at the same time McDonald assured him that the money secured by such deed of trust was fully paid, and that there was no claim against the land for any money due and unpaid under said deed of trust.

The agreement of counsel shows that the deed from McDonald to Folck, which is referred to in the bill of revivor, was executed as confirmation of the sheriff's deed. After the decease of William Naylor, the appellants, as administrators *de bonis non* of William McGuire, were made parties complainants on the seventh of March, 1848. On the nineteenth of April, 1830, John Folck filed a further answer, which is very much the same as the one already mentioned. John Folck died in January, 1841, and his administrators and heirs at law were made parties defendants. The heirs at law of Henry Dangerfield were also made parties. As the decision of the case must rest almost exclusively upon the bills, the answer of John Folck, and the proof in regard to the execution of the instrument (which by common consent has

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been called the deed of trust), it is unnecessary to notice the other answers in the cause.

The proof offered to establish the execution of the deed of trust is quite sufficient. This was not denied by the solicitor for the defendants. But it was conceded by the counsel on both sides that the acknowledgment was defective; and that although the instrument had been actually recorded among the land records of the county, it must be considered in every respect as if it never had been put upon record.

Two principal objections were urged against this claim. The first, that the deed is defective, because it was not acknowledged and recorded according to the provisions of our registry laws; and even in a court of equity the complainants can have no relief as against the defendants, except upon the principle recognized in the act of 1785, c. 72, sec. 11. And as the purchase by Folck was since the deed, and the original cause of action, on which the judgment was rendered, under which the sale was made to Folck, came into existence after the deed of trust, his title under the sheriff's deed can not be affected by the claim of the complainants.

The second objection is, that if the deed of trust is not rendered nugatory upon the grounds taken in the first, it still can not avail the complainants, because Folck was a *bona fide* purchaser for valuable consideration, without notice.

It is very true that our registry laws would seem strongly to sustain the position assumed in the first objection. But whatever weight it might have been entitled to formerly, it is now too late to be relied upon as a ground of defense. The decisions in England, in the different states of the Union, and in our own state, are too numerous and too pointed in the opposite direction to require an argument to show that an equitable claim, like the one under the present deed of trust, will be enforced in a court of equity, except against a *bona fide* purchaser without notice: See 2 White & Tudor's Eq. Cas., in 71 L. L. top p. 163, in notes to the case of *Le Neve v. Le Neve*, 3 Atk. 646; *Hudson v. Warner*, 2 Har. & G. 415; *Tiernan v. Poor*, 1 Gill & J. 216 [19 Am. Dec. 225]; *Alexander v. Ghiselin*, 5 Gill, 180; *Baynard v. Norris*, Id. 468 [46 Am. Dec. 647]; *Wilson v. Turpin*, Id. 59.

The second objection is one of more difficulty, and will require some examination. It involves the question whether Folck had notice of the prior equity of McGuire. On this subject the authorities are not uniform, and especially in regard to the pre-

cise point arising in this case, which is, whether information given to a purchaser, which ought to put him on inquiry, will, in equity, be considered sufficient notice. The decisions in some of the states have held that to set up an outstanding prior equity against a recorded deed, constructive notice would not avail, but actual notice clearly proved would be required. The supreme court of the United States, however, have said in *Vattier v. Hinde*, 7 Pet. 271: "Vattier's original purchase, then, can not avail him, because he was bound to notice the equity of Doyle. But there is, we think, much reason to believe that he had actual notice of that equity, or at any rate, was informed of circumstances which ought to have led to such inquiry as would have obtained full notice." And this is the language of Chief Justice Marshall. The same principle is fully recognized in *Graff v. Castleman*, 5 Rand. 207 [16 Am. Dec. 741]; *Pendleton v. Fay*, 2 Paige, 202; and *Hardy v. Summers*, 10 Gill & J. 324 [32 Am. Dec. 167]. The last three cases are cited in *Baynard v. Norris*, 5 Gill, 483 [46 Am. Dec. 647].

And immediately following the reference to those cases, the court of appeals manifest their decided approval of them, by saying: "For the establishment of so well-settled a principle, a reference to further authorities can not be necessary." Although this species of notice may be opposed by the decisions of distinguished judges in some of the states, we do not feel authorized to go in opposition to the supreme court of the United States and our own express adjudications.

The complainants having offered no proof on the subject of notice, we must look to the answer of Folck, to ascertain whether it contains anything which will supply the want of evidence on the part of the complainants. We there find it admitted, that after the sale, but before payment of the purchase money, Folck was informed of the existence of the deed of trust by McDonald, but immediately following that information, McDonald declared that the money intended to be secured by the deed had been fully paid. Here there is positive and actual notice as to the existence of the deed. Did the accompanying information as to the payment of the money, release Folck from the necessity of making further inquiry in relation to the truth of that matter? is the important question.

Can it be supposed that a man of ordinary prudence would have made the purchase, under the circumstances, without obtaining more satisfactory information as to the payment of the money? The man by whom he was informed of the payment

was, of all others, most likely to be tempted to misrepresent. The fact of his land being sold under execution is evidence of his embarrassed condition, and, of course, of the improbability of his having paid or discharged the incumbrance intended to have been created by the deed. His situation rendered it highly important that the land should bring as much as possible at the sale. And he was urging Folck to purchase, as the answer shows. There is not a word about having any receipts for the money, nor is there any excuse or reason assigned for not having them.

In *Jones v. Smith*, 1 Ph. 244; S. C., 19 Eng. Ch. 253, T. Smith, the intestate of the defendant, lent David Jones, the father of the plaintiff, a sum of money, and took a mortgage for the same on Jones' land. Whilst the treaty for this loan was going on, David Jones informed Smith that there had been a marriage settlement, which included his wife's estate, but not his own. This assertion both Jones and his wife offered to verify by swearing to it, if necessary. And when Smith asked to see the settlement, Jones told him that it was in the possession of his wife's brother, and he was afraid he could not get it without displeasing his aunt, who was a rich old lady. The lord chancellor held that this evidence did not constitute notice to the mortgagee. He considered the question before him to be whether, where a party is informed of the existence of a deed, which may but does not necessarily affect the property to be mortgaged, and it is stated at the time that the property is not affected by the instrument, but that it relates to some other property, whether, acting fairly and honestly, he believes the statement is true, but he is misled, and, in reality, the instrument does relate to the property, he is to be considered as having notice of the contents of the instrument. On this point he says: "Undoubtedly, where a party has notice of a deed, which from the nature of it must affect the property, or is told at the time that it does affect it, he is considered to have notice of the contents of that deed, and of all other deeds to which it refers; but where a party has notice of a deed which does not necessarily—which may or may not—affect the property, and is told that in fact it does not affect it, but relates to some other property, and the party acts fairly in the transaction, and believes the representation to be true, there is no decision that goes the length of saying that if he is misled, he is fixed with notice of the instrument."

This case was first decided by Sir J. Wigram, V. C.: 1 Hare,

43. His opinion, like that of the lord chancellor, was in favor of the defendant on the point of notice. His decision is based upon the ground that a marriage settlement does not of necessity include the husband's estate, and that information of a settlement, accompanied by an insurance from husband and wife that the husband's estate is not affected by it, does not impose upon the purchaser the obligation to make further inquiry, so that his failure to do so will fix upon him constructive notice of the true character of the settlement, if, in fact, the husband's estate is included. He thinks if this would be notice, it might, with equal propriety, be said that the marriage itself should be sufficient to create the necessity of inquiring whether there is not a settlement. And if so, then if a man deals with his neighbor without knowing he is married, the vice-chancellor seems to think that a purchaser should, upon the same principle, be affected with notice of his marriage, and thence with notice of the marriage settlement (if any), and thence with notice of the contents of the settlement. Thus it will be seen, that this case, in the very point on which it turned, was essentially unlike the one before us. Here the information was of a deed, which, the purchaser was informed, included the very land about to be sold to him.

In *Whitbread v. Jordan*, 1 You. & Coll. 303, cited in Coote's Law of Mortgage, 375, in 69 L. L., Boulnoes, one of the defendants, received from Jordan, the other defendant, a legal mortgage of copyholds, to secure a former debt and a fresh advance. At the time, Boulnoes knew that Jordan was indebted to the plaintiffs, who were brewers, and that it was their practice to take a deposit of title deeds, to secure the money due to them. Boulnoes inquired whether there had been such a deposit, and was informed there had not, but was assured, "that the plaintiffs had taken a note of hand merely, and that the property was unincumbered." He was also informed by Jordan that the copies of court were absent, because he had lost or mislaid them. Boulnoes was held bound, in consequence of his not having inquired of the plaintiffs.

This case, Coote says, has been questioned, and refers to Sugd. on Vend., 11th ed., 1054. However, he proceeds to remark: "But the decision was approved by Lord Lyndhurst, on the hearing of the case of *Jones v. Smith*, 1 Ph. 244, on appeal." In commenting upon *Whitbread v. Jordan*, *supra*, the lord chancellor evidently approves of the conclusion of the learned judge, who, in deciding the case, said that "the facts of the case were

such as to amount to negligence of so gross a nature that it would be a cloak to fraud if it were permitted:" 19 Eng. Cl. 255.

We do not design either to affirm or deny the principle involved in the point of this case, arising from the habit of the brewers. It has been referred to, for the purpose of showing the extent to which the English courts have gone, on the subject of constructive notice, in consequence of a failure to make proper inquiry. This case, and the reasoning of the lord chancellor in *Jones v. Smith*, *supra*, we think, establish the principle, that if a party has knowledge of the existence of an instrument, which actually does affect the land, but not being one of such a character that there may be some doubt whether the land is included or not, he will be charged with full notice of the instrument, in regard to its contents and effect, if he fails to make suitable inquiry. And that, although the party whose interest would prompt him to misrepresent, should assert that the incumbrance was paid off or discharged, without furnishing any proof whatever, or referring to any circumstances in support of his assertion, the purchaser or mortgagee who fails to make further inquiry will nevertheless be guilty of such degree of negligence that he will be considered as having notice.

The principle here advanced is very fully sustained in the case of *Hudson v. Warner*, 2 Har. & G. 415. There W. Warner and W. Vance obtained from J. & T. Vance a mortgage on personal property, which they neglected to have recorded. Afterwards a mortgage was given upon the same property, or a part thereof, to Hudson & Co., which was recorded immediately upon its execution. The suit was instituted to enforce the first mortgage, upon the ground of notice to the second mortgagees, which was expressly charged in the bill. The answer of Hudson denied that when he received the bill of sale he had any notice of any prior, legal, or equitable incumbrance upon the property, in favor of the complainants, or either of them. He also alleged that he had no notice of any delivery or pretended delivery to the complainants, or either of them, or to any person on their account; except only the book of accounts of the firm of J. & T. Vance, and other evidence of debts due the firm, which were referred to in the defendant's bill of sale as being in the possession of W. Warner, and which T. Vance represented to the defendant amounted to forty thousand dollars and upwards, and as being more than enough to satisfy all the debts of the firm: but that the books and evidences of

debts were then unjustly withheld from him (the said Vance) by W. Warner.

The answer also asserts that previous to the execution of the second bill of sale the defendant (H. Hudson) inquired of T. Vance whether there were any outstanding incumbrances on the property, "and was informed by him that indorsements had heretofore been made by Warren for J. & T. Vance, and a contract given to him, accompanied with a bill of sale upon some part of their property, but what part he did not state, but said that Warner had never been called upon to pay any of the notes of J. & T. Vance, and that the security which had thus been given to him, and the said pretended bill of sale, were of no avail, and had not been recorded, but were null, fraudulent, and void." The defendant further stated that Vance asserted there was no valuable consideration for the first bill of sale: that it "could not impair the security he then proposed to give to the defendant, even as to the books of accounts and securities then in the hands and possession of Warner, and much less incumber in any way the books and stationery then in the store No. 178 Market street, and the rooms and warehouses adjacent thereto; which he then agreed to transfer to the defendant by the bill of sale as aforesaid, and whereof the said Vance then appeared and represented himself to be in the sole and exclusive possession for and on account of the firm of J. & T. Vance." And the defendant asserted positively that he believed the information so given to him by Vance.

The court held Hudson bound by the notice, notwithstanding the positive statement in the answer as to his belief of the truth of the information given to him by Vance: which information was in express terms, that no advances or payment had been made upon the indorsements, which were the foundation of the first bill of sale; that the instrument was without consideration; that it was not binding even upon the book of accounts, and other evidences of debt mentioned in the second bill of sale; and especially that it was no incumbrance upon the books and stationery then in the possession of Vance and intended to be transferred to the defendant. Indeed, the court, in their opinion, consider the answer as alleging that the defendant was informed "that nothing was due upon the conveyance." But they ask the important question, From whom did he derive this information? And they answer it by saying: "From his creditor [which should be debtor], who was then pressed to give him security for his debt. Ought he to have confided in such

an interested representation from one whom common sagacity might have admonished would very naturally be inclined to rid himself of the pressing solicitations of importunate creditors by the most favorable representations of the unincumbered and unshackled condition of his estate?"

It is perfectly evident that the court considered Hudson guilty of great negligence, and by no means excused from the obligation of making further inquiry, in consequence of the information he received from Vance. They say, on this point: "If Hudson could have supported by testimony what he has set up in avoidance of this notice, his claim would have been presented in a very different view before this court. Could he have established the fact that he had made the inquiry of Warner into the nature his claim and lien, and had been led by Warner to believe that his incumbrances were removed, equity would never interpose to invalidate his claim. But these facts were necessary to have been established, as they constituted the only effective part of his defense, and it is scarcely necessary to say that his answer can furnish no evidence of these facts."

It has, however, been said that the bill in the present case charges notice, and that the answer in that respect is responsive to the bill, and must be considered as true. And that, therefore, the admission of notice must be taken in connection with the statement of the simultaneous information, as to the discharge or payment of the claim under the deed of trust, which released Folck from the necessity of inquiring further into the matter.

It will be seen that the bill, in the case of *Hudson v. Warner*, *supra*, charged notice. The answer, therefore, was as much responsive on that point as in the case before us. The court nevertheless relied upon the answer, as admitting notice to the defendant, before the bill of sale was given to him, that Warner and Vance had received a conveyance. And yet they did not, upon the allegation of a defensive character in the answer, consider the defendant relieved from the obligation to make inquiry. It is true the court do not rely exclusively upon the admission in the answer as proof of notice, but they lay much stress on that admission. Their language, on page 429, is, "The answer distinctly admits the notice." And on page 430, they speak of the answer, in connection with other matters, as leading irresistibly to the conclusion that Hudson had such notice as would affect his conscience, and that there existed some pre-existing equity.

A refusal to permit the answer of Folck to excuse him for not

having made further inquiry does not at all violate the rule, which requires that the statements in an answer, responsive to the bill, are to be received as true. We concede it to be true, as stated, that McDonald did inform Folck that the money secured by the deed of trust was fully paid, and that there was no claim against the land for any money due and unpaid under said deed. But admitting that he was so informed, he was not justified in relying upon such information coming from such a source. And failing to make proper inquiry, he was guilty of negligence to a degree which must charge him with notice of the lien and of its continuing existence; especially as he was informed that the deed was designed to create an incumbrance upon the very land he was about to purchase; and the information he received, as to the discharge of that incumbrance, rested solely upon the naked assertion of McDonald, unsupported by a particle of evidence or any circumstance whatever, or even an allusion to any.

Notice prior to payment of the purchase money will bind a party as effectually as if he had received it before his purchase: 2 White & Tudor's Eq. Cas., in 71 L. L., top p. 77, 78, 116.

This view of the subject being sufficient to decide the case, we refrain from saying anything in regard to the other points presented in argument.

The decree of the county court must be reversed and the cause remanded, with instruction to the circuit court for Alleghany county, to pass a decree allowing the claim of the complainants, appointing a trustee for the sale of the land mentioned in the proceedings, so that the proceeds thereof may be applied to the discharge of said claim, so far as the proceeds may be requisite for that purpose, and also to the payment of the costs: provided the claim with the costs shall not be paid or brought into court, within a reasonable time, to be set forth in such decree. And this court will sign a decree in accordance with these principles.

Decree reversed and cause remanded.

CONSTRUCTIVE NOTICE OF PRIOR TITLE, PARTY HAS WHO BECOMES AWARE OF CIRCUMSTANCES which should put him on inquiry. Possession as notice of possessor's title: See *McLaughlin v. Shepherd*, 52 Am. Dec. 646, and note, collecting prior cases. A party is affected with notice who becomes aware of facts, which, if inquired into with ordinary diligence, would have led to the required fact: *Chapman v. Glassell*, 48 Id. 41, and note citing prior cases. The principal case is cited to this point as affecting a party with notice of an equitable title or unrecorded claim, in *Baxter v. Sewell*, 3 Md. 341; *Mills v. Matthews*, 7 Id. 325; *Green v. Early et al.*, 39 Id. 229; *Abrams*

et al. v. *Sheehan*, 40 Id. 457; and as affecting an indorsee of a promissory note with notice of prior equities, in *Trust Estate of Woods, Weeks & Co.*, 52 Id. 552. In *General Ins. Co. v. United States Ins. Co.*, 10 Id. 525, it is held, citing the principal case, that to affect a party with notice of a prior unrecorded equity, at least such circumstances must be proved as would have been sufficient to put the party on inquiry.

NOTICE RECEIVED BEFORE PAYMENT OF PURCHASE MONEY avoids the plea of *bona fide* purchaser without notice: See *Bush v. Bush*, 51 Am. Dec. 675.

UNRECORDED DEED IS GOOD AGAINST ALL EXCEPT BONA FIDE PURCHASERS WITHOUT NOTICE: See *Vose v. Morton*, 50 Am. Dec. 750, and note collecting prior cases. The principal case is cited to the point that knowledge in fact of the prior unrecorded conveyance is equivalent to registration, in *Insolvent Estate of Conrad Leiman*, 32 Md. 244; to the point that an unrecorded trust deed, if valid against the party declaring the trust and his representatives, will be enforced against his general creditors, in *Carson v. Phelps*, 40 Id. 99; and to the point that defective registration is no registration, and can not affect a *bona fide* purchaser without notice, in *Brydon v. Campbell et al.*, Id. 337; *Johns v. Scott*, 5 Id. 81.

RECORDING DEED DEFECTIVELY ACKNOWLEDGED IS NUGATORY: *Herndon v. Kimball*, 50 Am. Dec. 406; *Choteau v. Jones*, Id. 460, and notes citing prior cases.

RESPONSIVE ANSWER IN EQUITY IS EVIDENCE FOR DEFENDANT: See *Commonwealth ex rel. Claghorn v. Cullen*, 53 Am. Dec. 450, and note citing prior cases.

WHITE v. FLANNIGAIN.

[1 MARYLAND, 525.]

PARTY SELLING PROPERTY LYING WITHIN LIMITS OF CITY, and in the conveyance bounding such property by streets, designated as such in the conveyance, or on a map made by the city or by the owner of the property, impliedly covenants that the purchaser shall have the use of such streets, although at the time of the sale they are unopened.

INJUNCTION WILL BE GRANTED AGAINST TRESPASS producing mischief which reaches to the very substance and value of the estate, and goes to the destruction of it in the character in which it is enjoyed.

INJUNCTION WILL BE GRANTED TO RESTRAIN ANY OBSTRUCTION which denies the exercise and use of right of way over a street to which complainant is entitled, as it works irreparable mischief to the street as a street.

IRREPARABLE INJURY MAY FOLLOW FROM OBSTRUCTION OF CITY STREET which would not ensue in case of a country road. The nature of a right sought to be protected by injunction should be kept in view.

ACTS OF MARYLAND ASSEMBLY RELATIVE TO POWER OF MUNICIPAL AUTHORITIES OF BALTIMORE to open streets do not entitle one as a matter of right to have a particular street opened by direction of corporate authorities, and therefore it can not be urged that a bill for such relief is not maintainable in equity, because complainant has a remedy with the municipal authorities.

PLEA OF LIMITATIONS RELIED ON IN ANSWER is not available on a motion to dissolve an injunction.

IT IS SUFFICIENT AVERMENT THAT INJURY IS IRREPARABLE in a bill for injunction to allege that the obstruction complained of works to complainant's great injury and in manifest violation of the obligations of the party against whom injunction is sought.

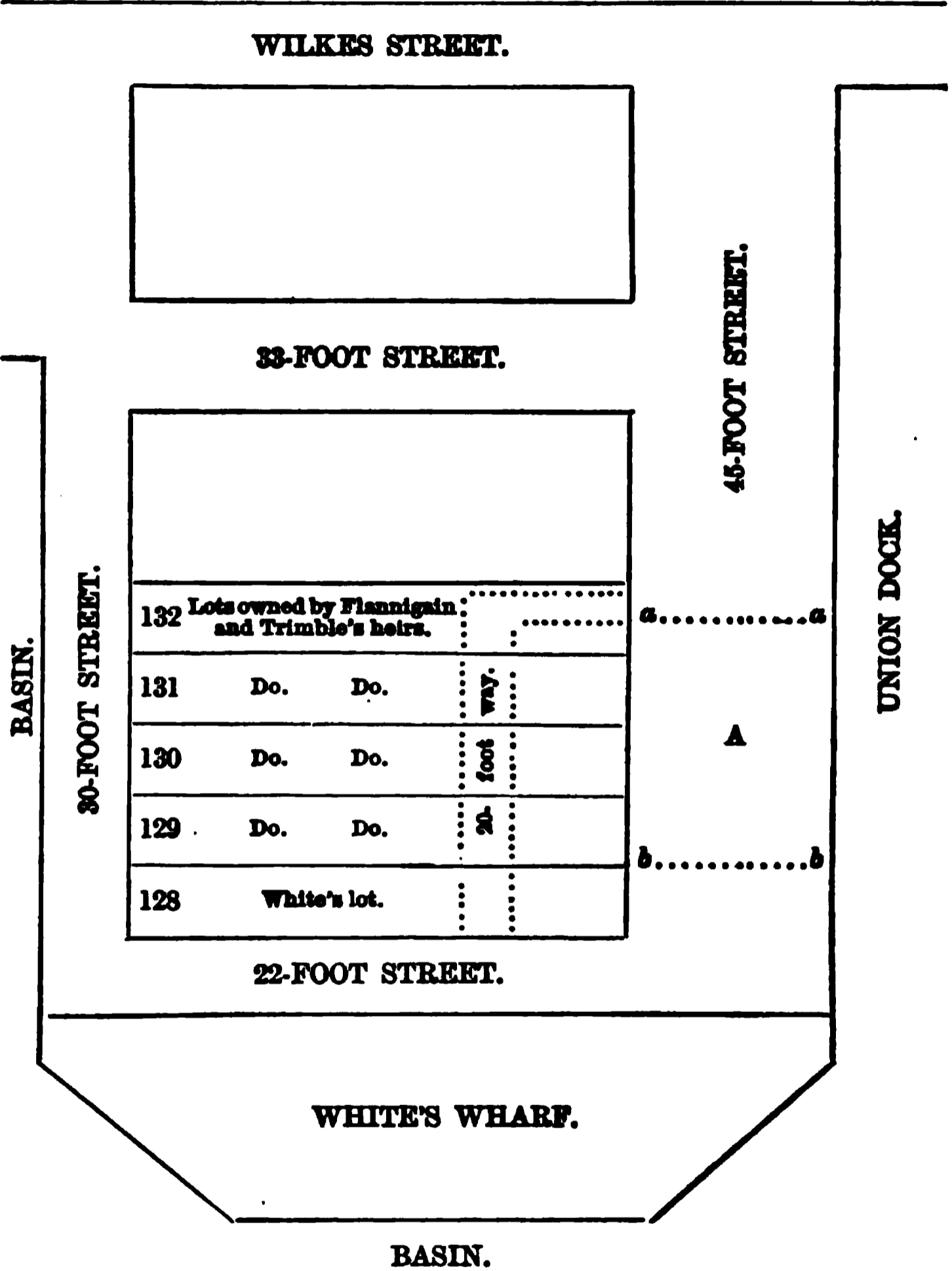
SUFFICIENT FACTS MUST BE STATED IN BILL FOR INJUNCTION to restrain irreparable injury to show that such injury will result from the act complained of.

COMPLAINANT MUST ALLEGE IN BILL FOR INJUNCTION AGAINST OBSTRUCTIONS TO USE of his property, that he uses such property, and that such use has been interfered with.

EQUITY CAN NOT ENJOIN ONE FROM EXERCISE OF RIGHT, which belongs to him in common with other owners of property in a city, of applying to the city authorities to open a street, he not having bound himself by any contract not to do so.

BILL in equity to obtain the removal of an obstruction placed in a forty-five-foot street in Baltimore by Flannigain, the heirs of Samuel Trimble, and their tenant Taylor, to obtain an injunction against the erection of further obstructions, and for other relief. The location of the property and the adjoining streets is shown in the accompanying diagram. White avers in his original bill that when the real estate of Thomas McElderry, deceased, was divided by the commissioners, they laid out several streets through the property, and among them a forty-five-foot street extending from Wilkes street to the twenty-two-foot street, as shown in the diagram, the latter street being also one of the streets laid out by the commissioners. The heirs entered into possession of their lots, and held them as bounding on the streets so laid out, and conveyed them as bounding in the same manner. White held lot 128 under a conveyance from the heirs of one Oliver, who had received this lot under a deed from one of the McElderry heirs, which described it as bounding on the forty-five-foot street. Lots 129, 130, 131, and 132 were owned by the defendants Flannigain and the heirs of Samuel Trimble as tenants in common, under a deed describing them as bounding on the forty-five-foot street. The bill then avers that Flannigain, in behalf of himself and his co-tenants, maintains fences extending across the forty-five-foot street to the edge of Union dock, and occupies more or less the whole of the roadway in the intervening space with lumber, thereby effectually obstructing all passage along the forty-five-foot street to and from complainant's lot and wharf. The bill prays that these obstructions be removed, and the further erection of fences and obstructions perpetually enjoined, and also for general relief; and in the

mean while prays a temporary injunction against the erection of any further obstructions by defendants. The temporary injunction was granted. A supplemental bill was filed by White for an injunction enjoining Flannigain from applying to the



city authorities to open the forty-five-foot street to the water's edge. This injunction was also granted. Flannigain's answer denies that the heirs of McElderry ever recognized the forty-five-foot street except by the conveyances set out in the bill. It

avers that the complainant had never used the forty-five-foot street as a means of access to his lot and wharf, nor had any one else; but that he had access to his lot and wharf by a twenty-foot way, described as shown in the diagram, by the permission of the defendants, and they had never obstructed his use of it. Flannigain further averred that he and his grantors had always occupied the forty-five-foot street as private property, and in the manner alleged in the bill; that he and his grantors had been in the adverse possession thereof during more than twenty years prior to the institution of this suit, and pleaded limitations. He then pleaded that the court had no jurisdiction, for the power to open streets was exclusively in the mayor and city council of Baltimore. The defendant Taylor, tenant of Flannigain and Trimble's heirs, averred in his answer, in addition to the averments of Flannigain, that complainant's remedy was at law. Upon the filing of the answers the injunctions granted on the bills were dissolved; and this is an appeal from the orders of dissolution. The argument was upon the bill and answers.

Campbell and Johnson, for the appellant.

Gill and Schley, for the appellees.

By Court, LE GRAND, C. J. The order which we pass in this cause makes it our duty, under the act of 1832, chapter 302, to dispose of all the questions which may arise out of the record.

Several objections have been urged to the equity set up in the bill of complaint. These are as follows: 1. That the street in question is not such a street as gives to the complainant any right to its use. 2. That if it be such a street, yet the complainant has mistaken his remedy, which, it is claimed, is at law, and not in equity. 3. That the averments in the bill are insufficient.

We propose briefly to examine these points of objection in the order in which we have stated them. It is alleged in the bill, and admitted in the answer, that the *locus* in question, and also the neighboring possessions of complainant and defendants, were originally the property of the late Thomas McElderry, and that it was divided, laid off, and sold to the present owners, as bounding on and calling for the streets delineated on the plat which accompanies, and is, in fact, a part of the pleadings in the cause.

The question, then, is, What is the effect of such division and sale? We hold that where a party sells property lying within the limits of a city, and in the conveyance bounds such property by streets designated as such in the conveyance, or on a map

made by the city or by the owner of the property, such sale implies, necessarily, a covenant that the purchaser shall have the use of such streets. The value of property within a city is, as is well known, much enhanced by the number of its feet which may bound on streets, either private or public, and the fact is notorious that proprietors of land, with the view of increasing the value of it, very frequently divide it so as to establish streets at points where there are none, under the authority of the corporation. When a sale, therefore, is made in conformity with such plan, it seems to be but plain justice to insist that the vendor, and all claiming under him, should be held bound by the lines and designations by which the property has been sold. This doctrine is fully established by a number of adjudications, but a few of which, however, we deem it necessary to notice.

In the matter of the application of the mayor, etc., in relation to the extension of Lewis street, in the city of New York, *In re Lewis Street*, 2 Wend. 475, the court say they "are, therefore, of opinion, that when a building lot is sold, bounded on a street in the city of New York, designated as such upon the map of the city, or on a map made by the owner of lands, in reference to which sales are made, although the street remains at the time unopened, under the authority of the corporation, a covenant may well be implied that the purchaser shall have an easement or right of way in the street, to the full extent of its dimensions."

According to this authority, the sale made by the heirs of Thomas McElderry gave to the purchasers, by virtue of an implied covenant, an easement or right of way to the forty-five-foot street designated on the plat to the full extent of its dimensions; a right in no way affected by the circumstance that at the time of sale the particular street was unopened.

The same doctrine is recognized and established in *Parker v. Smith*, 17 Mass. 415 [9 Am. Dec. 157]. The court there say: "The principal question in this case arises upon the construction of the deed of Joseph Russell to Benjamin Taber, in which he conveys a piece of land in what is now the town of New Bedford, bounding southwardly and westwardly on a way or street. By this description the grantor and his heirs are estopped from denying that there is a street or way to the extent of the land on those two sides. We consider this to be not merely a description, but an implied covenant that there are such streets."

The defendants in the case now before the court admit the sale, according to the pretensions of the complainant, and deduce their own titles from the same source, exhibiting, by the

conveyances under which they hold, a recognition of the existence of the forty-five-foot street. If, then, the case of *Parker v. Smith*, *supra*, be law, and we regard it as such, the defendants, in the absence of all title but that derived from McElderry, are estopped from denying there is such a street as that over which the complainant claims a right of way. The principle of *Parker v. Smith* is reaffirmed in *Emerson v. Wiley*, 10 Pick. 316, in which it was held that such a call for a street is not mere matter of description, but an implied covenant that there is such a street.

But it is said these views are in conflict with the doctrine laid down in *Underwood v. Stuyvesant*, 19 Johns. 186 [10 Am. Dec. 215]. We think not. That case was decided on the ground that the streets therein referred to were laid out on the contingency that they would be adopted by the local authorities: *Wyman v. Mayor etc. of New York*, 11 Wend. 500.

It is supposed, however, that the case of *Howard v. Rogers*, 4 Har. & J. 278, is an authority conclusive against the appellant upon this question. On a careful examination of the record in that case, we find it is different, in an essential particular, from the statement in the printed report. The object of Colonel Howard was to lay off a public square for the use of the state, in the event of the removal of the seat of government from Annapolis to Baltimore; and the record shows such to have been the public square contemplated by him, and not that it was, in any event, to be dedicated to the public use of the city of Baltimore.

The case appears to us to be within the principle of *Underwood v. Stuyvesant*, *supra*, where the lot was sold as bounding on a street, and which the purchaser took subject to the contingency of its being adopted as a public street by the authorities of New York. If the seat of government had been removed to Baltimore, and that lot had been selected for the public buildings, Colonel Howard could not have resisted a claim to have it so dedicated. The lot sold to Rogers called for German street, which street bounds on the square intended for public uses. If German street had been then, for the first time, laid off on the plat mentioned in the record, Colonel Howard could not have rightfully closed or refused to have opened it; his vendee having purchased under an implied agreement that he should have that right of way along the front of his lot. And if, as we presume was the case, German street was then a public street, the reference to it must be taken as merely descriptive of the location of Rogers' lot.

The next question presented for our consideration is, whether equity will interpose, by injunction, to protect the right of way of the complainant.

It is contended, on the part of the defendants, that even if the complainant be entitled to use the street in passing to and from his lot and wharf, yet he has mistaken his remedy in invoking the extraordinary forms of a court of equity, and that he would have sought redress, if entitled to any, at law, which is capable of giving him complete and adequate relief. In support of this view, the case of *Amelung v. Seekamp*, 9 Gill. & J. 468, and the case of *Hamilton v. Ely*, 4 Gill, 34, are relied on. We do not concur in the construction which has been placed on these cases by the court below, and by the counsel for defendants.

We understand the case of *Hamilton v. Ely*, *supra*, as merely affirming the principle previously laid down in the case of *Amelung v. Seekamp*, *supra*, which we take to be this: that a court of equity will not, as a general rule, interfere by injunction to restrain a mere trespass pending litigation at law, to try the title to land; but that it will so interfere under certain circumstances, which are, as enumerated by the court of appeals, under its late organization: 1. To prevent irreparable mischief or ruin; 2. To prevent a multiplicity of suits; 3. Where it is required by some peculiar circumstances.

In the case of *Amelung v. Seekamp*, *supra*, the court adopted the views of Chancellor Kent, in *Jerome v. Ross*, 7 Johns. Ch. 315 [11 Am. Dec. 484], and also the views of Justice Story, in his work on equity jurisprudence.

In the case of *Jerome v. Ross*, Chancellor Kent very fully reviews the course of decisions in England and in the state of New York, and, as we understand his opinion, recognizes the following principles: 1. That an injunction will not be granted to restrain a trespasser merely because he is a trespasser. 2. But that an injunction will issue where the injury is irreparable; or where full and adequate relief can not be granted at law; or where the trespass goes to the destruction of the property as it had been held and enjoyed; or where it is necessary to prevent multiplicity of suits in cases where the right is controverted by numerous persons, each standing on his own pretensions.

In the case before us, it appears that the wharf of the complainant, as laid down on the plat, has no outlet over the land, except by means of the thirty-foot street, the twenty-foot way, and the *locus* in dispute. To the twenty-foot way the complain-

ant has no right, except such as grows out of the permission of the defendant Flannigain, which may be withdrawn by him, from all we can see, whenever it may suit his pleasure. There is nothing in the case to show the present condition of the thirty-foot street; it may be wholly closed up by buildings or otherwise. The bill avers that the complainant can not have access to his lot and wharf along the forty-five-foot street, except over the obstructions which have been placed on said street; and the defendant Flannigain admits this street is closed up by obstructions placed there by himself, and points out the twenty-foot way as the only one by which the complainant can approach his lot and wharf. Considering this case, therefore, as presented by the bill and answer, we must regard the twenty-foot way as the only one open to the complainant, and even that as wholly dependent on the pleasure of the defendant Flannigain.

In such a case as this, is it necessary that a suit should be instituted, and prosecuted to a successful termination at law, before a court of equity can interpose by injunction? A majority of the judges who sat in this case think not.

Chancellor Kent, in his collocation of cases in *Jerome v. Ross*, *supra*, when speaking of the application of the remedy by injunction, says: "The practice has been introduced, and justly and reasonably applied to special cases, where irreparable ruin would have followed the refusal to enjoin the trespass. It was allowed by Lord Thurlow, in *Flamang's Case*, cited in 6 Ves. 147, where the defendant had worked from his own land into the coal mine of the plaintiff; and that case was followed by Lord Eldon, in *Mitchell v. Dors*, Id., and *Hanson v. Gardiner*, 7 Id. 307, on the principle that irreparable mischief and ruin of the property, as a mine, would be the consequence if the party was not stopped. On the same ground, the injunction is granted against diverting a watercourse from a mill: *Robinson v. Byron*, 1 Bro. C. C. 588; against the destruction of timber: *Courthope v. Mapplesden*, 10 Ves. 290; against the taking of stones of a peculiar value: *Earl Cowper v. Baker*, 17 Id. 128. But all these are cases of great and irremediable mischief, which damages could not compensate, because the mischief reaches to the very substance and value of the estate, and goes to the destruction of it in the character in which it is enjoyed."

Now, the principle on which the court interfered in these cases is, that the trespass produced a mischief which reached to the very substance and value of the estate, and went to the destruction of it in the character in which it is enjoyed. In the

cases of *Mitchell v. Dors*, 6 Ves. 147, and *Hanson v. Gardiner*, 7 Id. 307, relief was granted on the principle that irreparable mischief and ruin of the property as a mine would be the consequence of the trespass. The case now before the court falls directly within the principle. We have seen that the complainant is entitled under an implied covenant to a right of way over the forty-five-foot street. Any obstruction which denies the exercise and use of this right works irreparable mischief to the street as a street. The thing ruined by the obstructions is a street, and, as in the case of the mine, the complainant, on the principle there recognized, has the right to the aid of a court of equity. What he complains of is the destruction of the street. He is entitled to the enjoyment of it as a street. His title is clear, and, as we have already observed, can not be denied by any one claiming under the heirs of McElderry. In the case of *Hughes v. The Trustees of Weston College*, 1 Ves. sen. 188, the commissioners of a turnpike company entered, took possession of, and were destroying, by digging for gravel, large garden-grounds of the plaintiff, who was a gardener by trade. The turnpike act had specially excepted gardens, as well as orchards, planted walks, etc.; Lord Hardwicke thought it a clear case of trespass, and of such a nature that the plaintiff was entitled to seek his remedy by injunction, though he had his remedy at law. The interposition in that case was clearly on the ground that the orchard and garden, as such, were being destroyed. On such a case, although the party could have gone to law and had damages for the injury done him, yet, as these damages could not restore the thing, to wit, the garden, the court of equity gave him the relief sought.

In judging of the application of the remedy by injunction, reference must always be had to the nature and character of the thing to be protected. In the case of the mine to which we have referred, the thing was the coal; in the case before us, it is the street. By throwing obstructions over the street, so as to prevent a passage along its bed, it is just as much destroyed as if it were covered by a house; in the language of the authorities, it is irreparable mischief, because it destroys it as a street.

Justice Story says, "that where a party builds so near the house of another party as to darken his windows, against the clear rights of the latter, either by contract, or by ancient possession, courts of equity will interfere by injunction, to prevent the nuisance, as well as to remedy it, if already done, although an action for damages would lie at law; for the latter can, in no

just sense, be deemed an adequate relief, in such a case. The injury is material, and operates daily, to destroy or diminish the comfort and use of the neighboring house; and the remedy, by a multiplicity of actions, for the continuance of it, would furnish no material compensation:" 2 Story's Eq. Jur., sec. 926. And in section 927, he observes: "Cases of a nature calling for the like remedial interposition of courts of equity are, the obstruction of watercourses, the diversion of streams from mills, the back-flowage on mills, and the pulling down of the banks of rivers, and thereby exposing adjacent lands to inundation or adjacent mills to destruction. So where easements or servitudes are annexed by grant or covenant or otherwise to private estates." And there are cases in which courts will interfere to prevent multiplicity of suits and vexatious litigation: *Id.* 930; *Lucas v. McBlair*, 12 Gill & J. 1.

We do not understand the case of *Amelung v. Seekamp*, 9 Gill & J. 468, as in any degree conflicting with these well-established principles; so far from it, we regard it as distinctly recognizing and confirming them.

What was that case? It was a case in which the complainant asked the interposition of a court of equity, on the ground that a right of way over the land of the defendants had been obstructed by them; alleging that he had instituted his suit at law, to recover damages for the trespass. He claims the easement, on the ground of user for more than twenty years, and alleged that by the obstruction complained of "great and irremediable damage will accrue to him, his mills aforesaid being thus wholly cut off from their ancient and accustomed outlet."

Now we do not understand the court as saying that that would not have been a proper case for an injunction, had the complainant shown by the averments and facts, stated in his bill, that the obstructions of which he complained would work irreparable mischief to him. So far from it, we understand the court as asserting directly the reverse. After alluding to the statement in the bill, that great and irremediable damage would accrue to him, the court proceed to say: "But the reasons are not given, the facts not stated, which show to the court that this great and irremediable damage would result by the continuance of the obstruction." And, say the court, "it is not charged, that he has no other reasonably convenient outlet from his mills, that by this obstruction, a valuable portion of the customers of his mills will be driven from them. The mere allegation of a complainant, that irremediable damage, or irreparable mischief

will ensue, is not sufficient. To satisfy the conscience of the court, the facts must be stated, to show that the apprehension of injury is well founded. Without such a statement of facts, no injunction should have issued." And again, "so far," says the court, "from its exhibiting a case, where the continuance of the outrage complained of would work great and irremediable damage, it shows one which warrants the inference that the loss or injury would be trivial," etc.

The plain inference from all this is, that if Seekamp had set out in his bill a case of irreparable mischief, the injunction ought to have issued. And the court intimate, what would have made out such a case, to wit, that he had no other reasonably convenient outlet from his mills, and that by the obstruction, a valuable portion of the customers of his mills would be driven from them.

We have already said, that in treating of a question like that involved in this case, it is important the nature of the right sought to be protected should be constantly kept in view; and it is no less so, that the place where the property is located should be considered as an element of consequence. The dictates of common sense require this. A street in a populous city is a very different thing from a road in an agricultural region. In the latter case, it may be of comparatively slight consequence, whether the road be in one place or another; an approximation to the reasonable convenience of the neighborhood and customary travel is all that is generally desirable; but with the thronged thoroughfares of trade in a populous commercial city, a square may be of the greatest importance. In fact, property in a city derives its principal value from its location, its eligibility for business purposes; and in estimating this, facility of access is always deemed a circumstance enhancing the value; and therefore it is, the inhabitants of a city readily submit to the heavy burden of taxation necessary to the proper location of streets. In this view, therefore, we should not hold the same fullness of averment in a bill necessary, where the obstruction complained of is a street. A road that would be reasonably convenient in the country would render property similarly situated in regard to streets in a city comparatively if not wholly valueless for business purposes.

It was urged in argument, that the municipal authorities of the city of Baltimore are competent to grant the relief which the complainant asks, and that he should have made his application to the mayor and city council to have opened the street.

An examination of the several acts of assembly on this subject has brought us to a different conclusion.

By the sixteenth section of the act of 1817, chapter 168, the city is only authorized to open, widen, extend, or straighten any street or alley, on the application in writing of the proprietors of two thirds of the property intended to be taken.

By the act of 1832, chapter 57, the mayor and city council of Baltimore are authorized, in their discretion, upon the application of the proprietors of a majority of the feet in front or length, or any private wharf, dock, street, lane, or alley in said city, to cause the same to be paved, cleaned out, mended, or otherwise repaired or kept in good condition.

By the act of 1833, chapter 182, the local authorities are authorized, on the application of one or more persons interested in the ground to be taken, provided the same be uninclosed and unimproved, to sanction any streets which may be laid out by heirs, joint tenants, or tenants in common, in any division of real estate, which may be made by them.

And by the act of 1838, chapter 226, the mayor and city council have conferred upon them full authority to provide for the laying out, opening, extending, widening, etc., any street, etc., which, in their opinion, the public welfare or convenience may require.

Neither of these acts is adapted to the case of the complainant. By the act of 1817, chapter 168, the power of the city can not be exercised, unless two thirds of the proprietors of the property intended to be taken should ask it. Under this act, the complainant of himself could ask nothing of the municipal authorities, as his right, unless the requisite number of property holders should unite with him in the request. The act of 1832, chapter 57, submits the whole matter to the discretion of the mayor and city council, provided the proprietors of a majority of the feet in front, etc., shall authorize its exercise. Under this act they have no power to act, unless the requisite number of proprietors grant it, and when the power is conferred, they are under no obligation to exert it. The act of 1833, chapter 182, confers no power over ground which is inclosed or improved. In the case before the court, the bed of the street was inclosed, and was, therefore, not within the statute. And under the act of 1838, chapter 226, the power to open is only to be exercised whenever the mayor and council shall be of the opinion that the public welfare and convenience require it. The individual welfare and convenience of the complainant is not sufficient to call

for the exercise of the opinion of the mayor and council, and if they were, the opinion which might be formed of them by the mayor and council possibly might be in direct opposition, not only to his own judgment, but to his rights as guaranteed to him by his contract.

From this brief analysis of these acts of assembly, it will be seen that the complainant could not ask, as matter of right, that the particular street should be opened by the direction of the corporate authorities.

The plea of limitations relied on in the answer is not available on a motion to dissolve an injunction: *Hutchins v. Hope*, 12 Gill & J. 257.

From this view, it is apparent a majority of the court are of opinion that the complainant would be entitled to relief by an injunction, provided he has made the proper averments in his bill. The next question then for our examination is whether the averments are sufficient. By the act of 1832, chapter 302, this court is precluded from noticing any objection to the sufficiency of the averments of the bill, unless the exception was taken below.

One of the exceptions below was, that it is not shown by the bill that the injury complained of is of that "material and intolerable character which calls for the extraordinary preventive remedy of an injunction."

We do not understand the court either in the case of *Amelung v. Seekamp*, 9 Gill & J. 468, or in the case of *Hamilton v. Ely*, 4 Gill, 34, as saying it is necessary in words to aver the injury to be irreparable, but that facts showing it to be so must be stated in the bill. In the case before us the averment is, that the obstruction complained of works to his "great injury and in manifest violation of the obligations of the said Flannigain." This we consider a sufficient averment if the facts stated in the bill show the truth of it, but this we are of opinion they do not. It is nowhere alleged in the bill that the complainant has ever used his lot No. 128, or his wharf; nor that such use has been interfered with. This we think essential to the relief asked.

We do not deem it necessary to expend too many words in regard to the dissolution of the second injunction. The dissolution of the first necessarily carries with it the dissolution of the last. But independently of this, we are of opinion that Flannigain had the right to apply to the city council, as he did, not having bound himself by any contract not to do so, and

that the court of equity possessed no power to enjoin him from the exercise of a right which belonged to him in common with all other owners of property in the city of Baltimore.

The sixth section of the act of 1832, chapter 302, authorizes the court of appeals to remand the case, where the "purposes of justice will be advanced by permitting further proceedings, or the introduction of further evidence, or otherwise;" and following the precedent set in the case of *Browner v. Franklin*, 4 Gill, 472, this court will sign a decree affirming the decision of the superior court, and remanding the case to said court, that such further proceedings may be had therein, by way of amendment or otherwise, as may be deemed proper.

ECOLESTON, J., delivered a concurrent opinion, but dissented from the views expressed by the court.

Case remanded.

STATUTE OF LIMITATIONS, HOW AFFECTS COURTS OF EQUITY: See *Johnson v. Toulmin*, 52 Am. Dec. 212, and note collecting prior cases. Answer is considered on motion to dissolve an injunction only so far as it is responsive to the bill: *Hardy v. Summers*, 32 Id. 167.

INJUNCTION TO PREVENT PUBLIC OR PRIVATE NUISANCES, WHEN LIES: See *People v. City of St. Louis*, 48 Am. Dec. 339, and note citing prior cases. *Mandamus* to remove obstruction from a street does not lie against a municipal corporation where no special damage is alleged, because an indictment for nuisance is an effectual remedy: *Reading v. Commonwealth*, 51 Id. 534, and note collecting the cases in this series upon what constitutes nuisances in highways, and the remedies therefor.

RIGHT OF WAY OVER CERTAIN STREET PASSES BY DEED OF CITY LOTS bounded on such street. The principal case is cited to this effect in *Moale v. Mayor etc. of Baltimore*, 5 Md. 321; and that the vendor is estopped thereby from denying that it is a public thoroughfare: *Hess v. Baltimore etc. R. Co.*, 52 Id. 251; for he is supposed to have been compensated for the property dedicated as a street by the additional price he is thereby enabled to procure upon the sale of his lots: *McCormick v. Mayor etc. of Baltimore*, 45 Id. 525, citing the principal case. Conveyances of city lots are not governed by the same principles of construction as are applicable to property in the country: *Livingston v. Mayor of New York*, 22 Am. Dec. 622. The fee in a street passes by a conveyance of lots bounded thereon, so far as it fronts the lots: Id. But this principle does not apply to country roads: *Jackson v. Hathaway*, 8 Id. 263; *Sibley v. Holden*, 20 Id. 521. Recognition in a conveyance of city property of streets laid off by the grantor is evidence of a dedication of the streets to public use: *Godfrey v. City of Alton*, 52 Id. 476, and cases cited in the note.

INJUNCTION AGAINST TRESPASS, WHEN GRANTED.—Against an ordinary trespass, causing injury not irreparable, injunction does not lie: *Smith v. Pettingill*, 40 Am. Dec. 667, citing prior cases in the note, to the point that injunction issues only in those cases where the threatened injury is irreparable and the title to the land is unquestioned; and to this latter point, see *Bracken v. Preston*, 44 Id. 412, and cases cited in the note. Equity will en-

join grantor from irreparably injuring what he grants by implication: *Brown v. Burkenmeyer*, 33 Id. 541. Injunction does not lie where the right is doubtful: *Roath v. Driscoll*, 52 Id. 352, and note. *Fort v. Groves*, 29 Md. 194, was distinguished from the principal case on the ground that no irreparable injury ensued. The principal case is cited to the point that a party entitled to a right of way over a street is entitled to an injunction against the erection of obstructions thereon, in *Roman v. Strauss*, 10 Id. 97.

TRESPASS GOING TO DESTRUCTION OF PROPERTY IN CHARACTER IN WHICH IT HAS BEEN HELD and enjoyed will be enjoined, as it works irreparable injury. The principal case is cited as establishing this proposition, in *Chesapeake etc. Canal Co. v. Young*, 3 Md. 489; *Shipley v. Ritter*, 7 Id. 413; *Gilbert v. Arnold*, 30 Id. 37; *Mayor etc. of Frederick v. Groshon*, Id. 445; *Powell v. Rawlings*, 38 Id. 241; *Nicodemus v. Nicodemus*, 41 Id. 538.

BILL FOR INJUNCTION MUST STATE FACTS to show that injury complained of will work irreparable injury. The principal case is cited as authority to this effect in *Green v. Keen*, 4 Md. 106; *Roman v. Strauss*, 10 Id. 97.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

KING v. STATE MUTUAL FIRE INS. CO.

[7 CUSHING, 1.]

MORTGAGEE INSURING PREMISES GENERALLY FOR HIS OWN BENEFIT may recover, in case of a loss before payment of the mortgage, the entire sum insured without assigning his mortgage interest or any part of it to the insurers.

MORTGAGEE HAS INSURABLE INTEREST AND MAY INSURE GENERALLY on the property without disclosing his interest unless inquired of respecting it. **MORTGAGEE IS NOT TRUSTEE FOR MORTGAGOR BEFORE ENTRY** for condition broken. *Per Shaw, C. J.*

ASSUMPSIT on a policy of insurance. The facts agreed on by the parties sufficiently appear from the opinion.

J. A. Andrew, for the plaintiff.

O. S. Keith, for the defendants.

By Court, **SHAW, C. J.** This case comes before the court on a statement of facts. The statement is not very full and exact. We understand, from the statement and from the policy, which is made part of it, that the plaintiff made the insurance in his own name and for his own benefit, not describing his interest as that of a mortgagee, and paid the premium out of his own funds. The insurance was for three hundred dollars, on his interest in a two-story wooden barn. That interest, in fact, as it appears in the statement of facts and the mortgage deed produced, was that of a mortgagee under a deed previously made to him, by one Murphy, conditioned for the payment of four hundred dollars, which debt was outstanding and unpaid at the time of making the policy, the fire, and the demand of payment. The

defendants admit the loss by fire, within the time, and admit their liability, unless they have a right, as a preliminary condition to such payment, to demand an assignment of the plaintiff's mortgage interest as set forth in the statement of facts, or such proportion thereof as the amount so to be paid by them would bear to the whole mortgage debt. The plaintiff declined making such assignment, and brought this action to recover a total loss.

The court are of opinion that the plaintiff having insured for his own benefit, and paid the premium out of his own funds, and the loss having occurred by the peril insured against, he has, *prima facie*, a good right to recover; and having the same insurable interest at the time of the loss which he had at the time of the contract of insurance, he is entitled to recover a total loss. The court are further of opinion that, if the defendants could have any claim, should the plaintiff hereafter recover his debt in full of the mortgagor, it must be purely equitable; that the defendants can have no claim until such money is recovered, if at all; and therefore, that they have no right to demand the partial transfer of the mortgage debt, by them required, as a condition to their liability to pay, pursuant to the terms of their policy. This consideration is perhaps decisive of the present case; but the question having been argued upon broader grounds, and some authorities cited to sustain the claim of the defendants, which may give rise to further litigation, we have thought it best to consider the other question now.

We are inclined to the opinion, both upon principle and authority, that when a mortgagee causes insurance to be made for his own benefit, paying the premium from his own funds, in case a loss occurs before his debt is paid, he has a right to receive the total loss for his own benefit; that he is not bound to account to the mortgagor for any part of the money so recovered, as a part of the mortgage debt; it is not a payment in whole or in part; but he has still a right to recover his whole debt of the mortgagor. And so, on the other hand, when the debt is thus paid by the debtor, the money is not, in law or equity, the money of the insurer who has thus paid the loss, or money paid to his use.

The contract of insurance with the mortgagee is not an insurance of the debt or of the payment of the debt; that would be an insurance of the solvency of the debtor; of course, as a contract of indemnity, it is not broken by the non-payment of the debt, or saved by its payment.

It is not, strictly speaking, an insurance of the property, in the sense of a liability for the loss of the property by fire, to any one who may be the owner. It is rather a personal contract with the person having a proprietary interest in it that the property shall sustain no loss by fire within the time expressed in the policy. It is a personal contract, which does not pass to an assignee of the property: *Lynch v. Dalsell*, 4 Bro. P. C. 431; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507. A mortgagee has a proprietary interest, a title as owner, in the mortgaged property, not indeed absolute, but defeasible; still, it is a proprietary interest in that property, and the insurer guarantees to him that the subject in which he has such interest shall not be destroyed or diminished by the peril insured against.

There is no privity of contract or of estate, in fact or in law, between the insurer and the mortgagor; but each has a separate and independent contract with the mortgagee. On what ground, then, can the money thus paid by the insurer to the mortgagee be claimed by the mortgagor? But if he can not, it seems, *a fortiori*, that the insurer can not claim to charge his loss upon the mortgagor, which he would do if he were entitled to an assignment of the mortgaged debt, either in full or *pro tanto*.

The better to understand the precise case under consideration, it may be well to distinguish it from some which may seem like it, but depend on other principles.

If the mortgage debt is paid, and the mortgage discharged before the loss by fire, it may well be held that the mortgagee, the assured, can not recover; not merely because the debt is paid, but because the mortgage is thereby redeemed, and revested in the mortgagor; and the proprietary interest of the assured in the property insured, in respect to which alone he had any insurable interest, is determined. And it is a fixed rule of law, that, to make a policy valid, and enable the assured to recover a loss, he must have an interest in the subject when the contract is made, and when the loss occurs. He must have such an interest when the contract is made, otherwise it is a wager policy, and void; and when the fire occurs, otherwise he sustains no loss by any damage done by the fire to the thing insured, and he has no claim on the contract of indemnity. So, if an owner insure his house, which is burned within the time limited, if he has sold his house in the mean time he has no legal claim to recover.

Another case, quite distinguishable, is, where the mortgagor causes insurance to be made on the mortgaged premises, pay-

able to the mortgagee in case of loss. In that case, it is the mortgagor's interest in the subject which is insured, with an irrevocable power of attorney, in legal effect, an assignment, to the mortgagee, as additional collateral security, to receive the avails of the loss, if one happens. In such case, it is very clear that, in case of loss, the insurers must pay the whole amount of the loss, without regard to the fact that the debt has or has not been paid. If the mortgage debt has not been paid, the money received will go to pay it *pro tanto*, and thus inure to the benefit of the mortgagor, by leaving so much less of his debt for him to pay. If the mortgage debt has been paid, then the loss, when received by the mortgagee, is received from a fund placed in his hands for a special purpose, which has been accomplished; it is the proceeds of an insurance of the interest of the mortgagor, by a contract with him, on a consideration made by him, and assigned to the mortgagee; and of course he receives it to the use of the mortgagor, and must account to him for it.

There is another case not uncommon in practice, where it is agreed at the time of the making of the mortgage, that the mortgagee may cause the property to be insured at the expense of the mortgagor, and that the premium shall be added to the principal and interest, as the debt to be paid on redemption. This is a valid contract; it is not obnoxious to the charge of usury; for, though the sum thus paid inures incidentally to the benefit of the mortgagee, it goes ultimately to the mortgagor's benefit. Then, if a loss occurs before the debt is paid, the sum payable to the mortgagee is the proceeds of a security furnished by the mortgagor, and then, by a general rule of law, applicable to the proceeds of all collateral security furnished by a debtor to his creditor, it goes in reduction of the debt. It is, in effect, a security furnished by the mortgagor; the money received under it is his money, and extinguishes his debt in the same manner as if paid by him.

In all these cases, the mortgagor pays the premium; the amount of insurance is a sum placed in the hands of the mortgagee, at the expense of the mortgagor, and as further collateral security for the debt, and of course the mortgagee is trustee for the mortgagor, first, to apply the proceeds of that, as of all other collateral securities, to the payment of his debt; but if the debt has been paid, or there is an overplus, he is trustee for the mortgagor. But this furnishes no defense to the insurer. The mortgagee had a title, a qualified title, to the whole mortgaged

property; had a right to insure the whole insurable value in his own name; and whether, having recovered the whole, he has a right to retain it to his own use, or is bound to account for it to the mortgagor, it is wholly immaterial to the insurer. It depends on the contract or the relations subsisting between the mortgagor and mortgagee, with which the insurer has no concern.

So it was held in a New York case, that a commission merchant, who had made advances or incurred expenses on goods consigned to him for sale, might insure the whole and recover the whole in his own name; and that it was no defense for the insurer, that the assured was not absolute owner, or might be liable to account to his principal: *De Forest v. Fulton Ins. Co.*, 1 Hall, 84.

But it is then intimated that the mortgagee is trustee for the mortgagor; and that, on the ground of this fiduciary relation, what he receives in that character he must account for. But in truth, he is not such trustee. Nothing (an eminent judge has said) is so likely to mislead as a simile. In some very limited respects a mortgagee is a trustee; as when he has entered, and is in the receipt of the rents and profits, he is liable to account therefor, and in that respect may be denominated a trustee. This point has arisen in many cases; but a recent one is direct to the point, and decisive: *Clarke v. Sibley*, 13 Met. 210. Wilde, J., in giving the opinion of the court, cites the case of *Cholmondeley v. Clinton*, 2 Jac. & W. 183.

If this is true in England, where the rights of the mortgagee, after condition broken, are purely equitable, and such as are administered by a court of equity; much more in Massachusetts, where the right to redeem, after condition broken, is ascertained and regulated by law, as effectually as the right of the mortgagee to hold for the security of the debt.

Besides, if the fiduciary relation subsisted, and the mortgagee were held to be a trustee for the mortgagor, it would follow that, as every reasonable expense incurred by the trustee would be chargeable upon the trust fund, a premium of insurance on buildings held for security, honestly and judiciously made, would be a charge on the fund, as much so as necessary repairs. But, in the absence of contract, no such charge is allowed to the mortgagee, in taking an account on a bill to redeem: *White v. Brown*, 2 Cush. 412. Certainly, before entry for condition broken, the relation of mortgagee and mortgagor is that of contracting parties, and not that of trustee and *cestui que trust*.

But it is said, and in this certainly lies the strength of the

argument, that it would be inequitable for the mortgagee first to recover a total loss from the underwriters and afterwards to recover the full amount of his debt from the mortgagor, to his own use. It would be, as it is said, to receive a double satisfaction. This is plausible, and requires consideration; let us examine it. Is it a double satisfaction for the same thing, the same debt, or duty?

The case supposed is this: A man makes a loan of money, and takes a bond and mortgage for security. Say the loan is for ten years. He gets insurance on his own interest, as mortgagee. At the expiration of seven years the buildings are burned down; he claims and recovers a loss to the amount insured, being equal to the greater part of his debt. He afterwards receives the amount of his debt from the mortgagor and discharges his mortgage. Has he received a double satisfaction for one and the same debt?

He surely may recover of the mortgagor, because he is his debtor, and on good consideration has contracted to pay. The money received from the underwriters was not a payment of his debt; there was no privity between the mortgagor and the underwriters; he had not contracted with them to pay it for him, on any contingency; he had paid them nothing for so doing. They did not pay because the mortgagor owed it; but because they had bound themselves, in the event which has happened, to pay a certain sum to the mortgagee.

But the mortgagee, when he claims of the underwriters, does not claim the same debt. He claims a sum of money due to him upon a distinct and independent contract, upon a consideration, paid by himself, that upon a certain event, to wit, the burning of a particular house, they will pay him a sum of money expressed. Taking the risk or remoteness of the contingency into consideration (in other words, the computed chances of loss), the premium paid and the sum to be received are intended to be and in theory of law are precisely equivalent. He then pays the whole consideration, for a contract made without fraud or imposition; the terms are equal, and precisely understood by both parties. It is in no sense the same debt. It is another and distinct debt, arising on a distinct contract, made with another party, upon a separate and distinct consideration paid by himself.

The argument opposed to this view seems to assume that it would be inequitable, because the creditor seems to be getting a large sum for a very small one. This may be true of any insur-

ance. A man gets one thousand dollars insured for five dollars, for one year, and the building is burned within the year; he gets one thousand dollars for five dollars. This is because, by experience and computation, it is found that the chances are only one in two hundred that the house will be burned in any one year, and the premium is equal to the chance of loss. But suppose—for in order to test a principle we may put a strong case—suppose the debt has been running twenty years, and the premium is at five per cent., the creditor may pay a sum equal to the whole debt, in premiums, and yet never receive a dollar of it from either of the other parties: not from the underwriters, for the contingency has not happened, and there has been no loss by fire; nor from the debtor, because, not having authorized the insurance at his expense, he is not liable for the premiums paid.

What then is there inequitable, on the part of the mortgagee, towards either party, in holding both sums? They are both due upon valid contracts with him, made upon adequate considerations paid by himself. There is nothing inequitable to the debtor, for he pays no more than he originally received in money loaned; nor to the underwriter, for he has only paid upon a risk voluntarily taken, for which he was paid by the mortgagee a full and satisfactory equivalent.

It may then be said that, upon these grounds, a wager policy might be held valid, and a good ground of action. We suppose a wager policy is not held void because it is without consideration, or unequal between the parties; but because it is contrary to public policy, and prohibited by positive law. But, independently of considerations of public policy, if an insurance were made on a subject in which the assured has no pecuniary interest—although in other respects he may be deeply concerned in it, and on that ground be willing to pay a fair premium—made with a full knowledge of all the circumstances, by both parties, without coercion or fraud, we can not perceive why it would not be valid as between the parties. But upon the strong objections on grounds of public policy to all gaming contracts, and especially to contracts which would create a temptation to destroy life or property, such policies, without interest, are justly held to be void.

We are not unaware that there are very respectable authorities opposed to the views of the law above taken.

Mr. Phillips, in treating of the rights of parties after an abandonment, seems to put the rights of the underwriter, who has paid a loss on the ground of subrogation, and then adds:

“Where a policy against fire is effected by a mortgagee for his own benefit, in case of loss, and payment by the underwriters, they thereby become entitled to a proportional interest in the debt secured by the mortgage:” 2 Phill. Ins., 2d ed., 419. In support of this position, the learned author cites several authorities, which we propose to examine.

Robert v. Traders' Ins. Co., 17 Wend. 631. We think this case does not support the position for which it is cited. The mortgagor was the assured, and had assigned his policy to the mortgagee. Of course it was the interest of the mortgagor which was insured, and it was assigned by him to the mortgagee, as a further collateral security. A suit was brought in the name of the mortgagor, the assured, but for the benefit of the mortgagee, and judgment obtained against the insurers; and before the satisfaction of that judgment the mortgage debt was paid to the mortgagee by the mortgagor, by coercion, to avoid foreclosure, and the interest of the mortgagee was thus determined; and it was insisted by the defendants that this satisfaction of the debt discharged the judgment on the policy. But it was held otherwise, and that the mortgagor was entitled to recover the insurance. The effect of this adjudication was, that it was an insurance made upon the interest, at the expense and for the ultimate benefit of the mortgagor; that the assignee had a right to recover to his own use, until the payment of his debt, and then held as trustee for the mortgagor. This case, we think, affirms the principles on which we proceed

Mr. Phillips also cites *Aetna Fire Ins. Co. v. Tyler*, 16 Wend. 385 [30 Am. Dec. 90]. Some portion of the language of the chancellor, in giving the judgment of the court of errors, in that case, is certainly more in point. He states, that one who has a lien on land and buildings for unpaid purchase money has an insurable interest, and may insure and recover to the whole amount of the unpaid purchase; but he adds, that when he shall receive that money from the purchaser, he will be bound, by the principle of equitable subrogation, to account for it to the insurers who have paid his loss. The case went through several courts, and is somewhat complicated. As we understand it, these latter remarks of the chancellor stated a principle not necessary to the decision of the case. The questions were, whether the plaintiff, who held a bond for a deed, an equitable title only, had an insurable interest, and whether he had any prior insurance when the policy was made. It was held, that a policy obtained by his vendor, the owner of the fee, was not an insurance

in which this plaintiff had, or could have, any interest, and therefore, that it was no insurance for him. The remarks above cited applied to the policy obtained by the owner of the fee, which would cover his debt only, and subject him to account, in case of receiving the money from the debtor after recovering it from the underwriters. Whether such would be the consequence or not, could make no difference, in regard to the right of this plaintiff to recover of these defendants, and was not, therefore, embraced in the judgment.

Looking at the analogies and illustrations on which the reasoning of the learned chancellor is founded, it may be a question whether he has not relied too much on the cases of marine insurance in which the doctrines of constructive total loss, abandonment, and salvage are fully acknowledged, but which have slight application to insurances against loss by fire.

We are then brought to the case of *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495. The language of Mr. Justice Story, in giving the opinion of the court in that case, is certainly very strong; but the part of it which bears upon the point of the present case was not necessary to the judgment of the court. The question for the court was, whether Carpenter, the plaintiff, had a prior insurance on the premises at the time of making this policy, not disclosed. In fact, he had before made an insurance on his own interest, for the purpose of assigning it to a mortgagee, and had assigned it to a mortgagee; so that it was insisted, that it was not a prior assurance to himself, when he obtained the policy now in suit. But it was held, that, being a policy made by the mortgagor on his own interest, and assigned to his mortgagee, as a further collateral security, it was in legal effect an insurance for himself; because, if recovered by the assignee, it would go to pay his own debt, *pro tanto*, and relieve him; if his debt was otherwise paid, the assignee would recover as trustee to the mortgagor; so that, either way, it was an assurance for him. The judge is pointing out the difference between an insurance of the interest of a mortgagor, assigned by him to his mortgagee, and an insurance direct to a mortgagee, on his interest as mortgagee, and then states that his interest is the debt, and that, if he first recovers of the underwriters, as he may if his debt is not paid, and afterwards the debt is paid by the mortgagor, he will hold the money in trust for those insurers who have paid him his loss. It is obvious, we think, that these last observations were merely following out a train of thought, suggesting the distinctions between the

two species of insurance, and that the principle announced was not necessary to the decision, and may not, therefore, be necessarily considered as the judgment of the court. Indeed, it may have been the learned judge's own first impression, without having carefully considered it, in all its relations. Any statement of legal principle from so high a source is entitled to great respect; but under the circumstances we can not deem it conclusive.

It is obvious to remark, as the result of all these cases, concurring with many others, that a mortgagee has an insurable interest; that he may insure generally on the property, and need not disclose the peculiar nature of his interest, unless inquired of; that, before payment of his debt, he may recover and receive to the amount of his debt; and that it is no defense for the underwriter, that the plaintiff holds a defeasible and not an absolute title to the property insured.

Some other cases are referred to as analogous, but the analogy is not very clear or direct.

In *Godsall v. Boldero*, 9 East, 72, a creditor made insurance on the life of Mr. Pitt; Mr. Pitt died insolvent whilst the policy was in force, and an action was commenced. Before it came to trial, the debt was paid by the executors from funds furnished by parliament for that purpose, and it was held to be a bar to the plaintiff's action. Strictly speaking, one can have no interest, in the nature of property, in the life of another; and we think that this case, influenced to some extent by existing English statutes, was decided on the ground that the interest was terminated when the debt was paid. Besides, it might well be maintained that, in consequence of Mr. Pitt's devotion to the public service, and in honor to his memory, the government intended by the public bounty to provide that no one should suffer pecuniary loss by his insolvency; and that to permit the plaintiffs to recover would be to throw a loss on the insurers, for which they could have no indemnity. The bearing of this case upon the present is but slight.

In a recent edition of Kent's Commentaries, the principle that the insurer on the interest of a mortgagee, as such, on payment of a loss, is entitled to a proportion of the mortgage debt, is stated in a note, on the authority of *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495; but it seems to add nothing to the weight of that authority.

On a view of the whole question, the court are of opinion that a mortgagee who gets insurance for himself, when the insurance

is general upon the property, without limiting it in terms to his interest as mortgagee, but when, in point of fact, his only insurable interest is that of a mortgagee, in case of a loss by fire, before the payment of the debt and discharge of the mortgage, has a right to recover the amount of the loss for his own use.

Judgment for the plaintiff.

MORTGAGEE HAS INSURABLE INTEREST IN MORTGAGED PROPERTY: *Jackson v. Massachusetts Mut. Fire Ins. Co.*, 34 Am. Dec. 69; *Bell v. Western etc. Ins. Co.*, 39 Id. 542; *Motley v. Manufacturers' Ins. Co.*, 50 Id. 592, and cases cited in the notes thereto. See also the note to *Strong v. Manufacturers' Ins. Co.*, 20 Id. 510, discussing the subject of insurable interest generally. That a mortgagee insuring need not describe the nature of his interest unless called for or required by the policy, is a point to which the principal case is cited in *Williams v. Roger Williams Ins. Co.*, 107 Mass. 379.

RIGHTS OF MORTGAGEE UNDER INSURANCE ON MORTGAGED PROPERTY.—The question as to the rights of a mortgagee under an insurance policy depends, as very clearly appears from the discussion in the principal case, not only upon whether the insurance is effected by the mortgagee or by the mortgagor, but also upon whether it is, in either case, effected pursuant to an agreement between the parties or by one independently of the other. These various aspects of the question we purpose briefly to discuss in this note.

WHERE MORTGAGEE INSURES INDEPENDENTLY OF MORTGAGOR, the former's rights depend upon what is to be deemed the *corpus*, or thing insured.

1. *What Deemed to be Subject of Insurance in Such Case.*—If the mortgagee insures generally, declaring at the time an intent to cover the mortgagor's interest as well as his own, the contract is without doubt to be deemed an insurance upon the property, and the mortgagee may recover the whole amount of the loss, subject to a trust, as to the surplus beyond the mortgage interest, to hold the proceeds for the mortgagor: *Flanders on Ins.* 404, 405; *May on Ins.*, sec. 456; *Richardson v. Home Ins. Co.*, 21 U. C. C. P. 291. And in the case last cited it is held that parol evidence is admissible to show, in such a case, that the mortgagee, at the time of the insurance, declared his intent to insure also the mortgagor's interest.

On the other hand, whether the insurance by a mortgagee on his own account is general or special, if there be no declared purpose to insure the mortgagor's interest, there is considerable difference of opinion as to what is to be regarded as the thing insured. Mr. Justice Story, in *Carpenter v. Providence etc. Ins. Co.*, 16 Pet. 495, declares that such an insurance is but an insurance of the debt. In other cases, such an insurance is said to be an insurance of the capacity of the insured property to pay the debt: *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253; *Flanders on Ins.* 400. In *Smith v. Columbia Ins. Co.*, *supra*, Gibson, J., says that in such a case "it is not the specific property that is insured, but its capacity to pay the mortgage debt. In effect, the security is insured." And this was held to be so, although, in that case, the insurance was stated in the policy to be upon the "property." It was said, however, in the same case, that insurance of the capacity of the property, to pay the debt, was in effect an insurance of the debt. And this is no doubt true, for an insurance of the debt, in such a case, can certainly mean no more, in any event, than an insurance that the mortgagee will not, by any loss within the policy, be disabled from making his debt out of the insured

property, that is to say, that the property shall not be, by any such loss, so impaired as not to remain a sufficient security for the debt. It would seem absurd to say that a contract to insure a mortgagee against loss by fire on the mortgaged property amounts to an insurance of the debt generally, that is to say, an insurance that notwithstanding any loss within the policy the mortgagee will be able to make his debt either out of the property or out of the debtor personally. This would make the contract a sort of alternative insurance either of the capacity of the property to answer the debt, or of the personal solvency of the debtor; so that, even though the whole property were destroyed by the very peril insured against, the insurer would still escape liability if the debtor could otherwise be made to pay the debt, and this although the debtor's name was not even mentioned in the contract.

In other cases it is said that while such a contract is not an insurance of the mortgage debt, it is an insurance of the mortgagee's interest in the property: *De Wolf v. Capital City Ins. Co.*, 16 Hun, 116.

Each of the views which we have mentioned is, in a measure, correct, and yet, as it seems to us, no one of them is entirely accurate. That such a contract is not an insurance of the debt is clearly held in *Suffolk Fire Ins. Co. v. Boyden*, 9 Allen, 123; *Foster v. Van Reed*, 5 Hun, 321 (reversed on another point in S. C., 70 N. Y. 19); *De Wolf v. Capital City Ins. Co.*, 16 Hun, 116; *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343; S. C., 14 Am. Rep. 271; see also *Louden v. Waddle*, 12 Ins. L. J. 289 (Penn.) It is no part of the business of insurance companies to insure or guarantee debts; their function is to insure property against loss by fire or other specified calamity: *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, *supra*. So it is not an insurance of the capacity of the property to pay the debt in any such sense that the contract is to be deemed unbroken so long as the property remains sufficient to pay the debt, notwithstanding a loss by the peril insured against. This is clear from cases presently to be cited. And yet, in a certain sense, there is no doubt that such an insurance by a mortgagee is an insurance of his security. Nor is an insurance by a mortgagee, in all respects, an insurance of his interest in the property, for this would be simply an insurance of his debt or of the capacity of the property to pay his debt; since his debt is the measure of his interest: *Suffolk Fire Ins. Co. v. Boyden*, 9 Allen, 123; *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343; S. C., 14 Am. Rep. 271.

The true doctrine, as it seems to us, is that an insurance by the mortgagee for his own benefit, independently of the mortgagor, is upon the property in its character as a security for the mortgage debt. The contract of the insurer is that the property, which constitutes the security, shall suffer no deterioration by a loss by fire during the term of insurance. If any such loss happens, the insurer is liable, and it is no concern of his whether the security remains sufficient to answer the debt or not; it is enough that the security is that for which the mortgagee has stipulated, and that it has been impaired by the peril insured against: *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343; S. C., 14 Am. Rep. 271. What we conceive to be the true view is very clearly stated by Folger, J., in the case just cited. He says: "To say that it is the debt which is insured against loss is to give to most if not all fire insurance companies a power to do a kind of business which the law and their charter do not confer. They are privileged to insure property against loss or damage by fire. They are not privileged to guarantee the collection of debts. If they are, they may insure against the insolvency of the debtor. No one will contend this; and, it will be said, it is not a guaranty of the debt, but an indemnity is given against a loss of the debt by an insurance against

peril to the property by fire. This is but coming to our position that it is the property which is insured against the loss by fire, and the protection to the debt is the sequence thereof. As the property it is which is insured against loss, it is the loss which occurs to it which the insurer contracts to pay, and for such loss he is to pay within the limits of his liability, irrespective of the value of the property undestroyed. So as to the remark that it is the capacity of the property to pay the debt which is insured. This is true in a certain sense; but it is as a result and not as a primary undertaking. The undertaking is that the property shall not suffer loss by fire; that is, in effect, that its capacity to pay the mortgage debt shall not be diminished. When an appreciable loss has occurred to the property from fire, its capacity to pay the mortgage debt has been affected; it is not so well able to pay the debt which is upon it. The mortgage interest, the insurable interest, is lessened in value, and the mortgagee, the insuree, is affected, and may call upon the insurer to make him as good again as he was when he effected his insurance."

2. *Sufficiency of Security after Loss, Repairs by Mortgagor, etc.*—It follows from the doctrine above laid down that the fact that, after a loss, the remaining property is wholly or partly sufficient to pay the mortgage debt is no defense to an action on the policy: May on Ins., sec. 1156; Wood on Fire Ins. 767; *Rex v. Insurance Cos.*, 2 Phila. 357; *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343; S. C., 14 Am. Rep. 271; though the contrary is very emphatically laid down by Judge Gibson in *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253, where he says: "No one pretends that the mortgagee of a house, who had insured it, could recover for the burning of a few shingles in the roof of it, though the unimpaired value of the building might be much greater than the amount of the mortgage." Neither is it any defense that the mortgagor has repaired the loss: May on Ins., secs. 424, 456; Wood on Fire Ins. 782; *Foster v. Equitable etc. Ins. Co.*, 2 Gray, 216, 221, citing the principal case. The assured is not required to exhaust his remedies against the property or the debtor before resorting to his policy: *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343; S. C., 14 Am. Rep. 271; *Rex v. Insurance Cos.*, 2 Phila. 357; May on Ins., sec. 424.

3. *Mortgagee can Recover Only to Extent of Interest.*—A mortgagee thus insuring independently, solely for the protection of his own interest, can recover for a loss only to the extent of his interest, of which, as already stated, the debt is the measure: May on Ins., sec. 424; Wood on Fire Ins. 767; *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253; *Carpenter v. Providence etc. Ins. Co.*, 16 Pet. 495; *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343; S. C., 14 Am. Rep. 271; *Richardson v. Home Ins. Co.*, 21 U. C. C. P. 293. If the debt is wholly paid before a loss the mortgagee can recover nothing, for his insurable interest is thereby extinguished: *Carpenter v. Providence etc. Ins. Co.*, 16 Pet. 495. If the debt is partly paid before the loss, the recovery is to be limited in any event to the balance remaining unpaid: *Sussex etc. Ins. Co. v. Woodruff*, 2 Dutch. 541. But if the payment is made after the loss, or at all events after suit brought, it seems it does not reduce the recovery: May on Ins., sec. 424; Wood on Fire Ins. 767; *Sussex etc. Ins. Co. v. Woodruff*, 2 Dutch. 541. The amount specified on the face of the mortgage, if under seal, is the utmost limit of the recovery if there have been no payments; the contract of insurance can not be extended by parol to cover subsequent advances by the mortgagee: May on Ins., sec. 424; *Ogden v. Montreal Ins. Co.*, 3 U. C. C. P. 497. But where one who has contracted to purchase certain mortgages pays only part of the purchase money, and insures

for the protection of his interest, and a loss happens before the money is all paid, the recovery is not limited to the amount paid, but may include also the amount which the insured is yet bound to pay: *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343; S. C., 14 Am. Rep. 271. An assignment of part of the mortgage debt to one who makes no claim will not preclude the mortgagee from recovering an insurance effected by him to the extent of the residue: *Rex v. Insurance Cos.*, 2 Phila. 357.

4. *Mortgagor has No Claim to Proceeds of Insurance.*—That the mortgagor has no claim to an insurance effected by the mortgagee upon his own account, without any agreement therefor between the parties, and can not insist upon having the proceeds of such insurance applied upon the mortgage debt, nor claim any deduction in a suit for foreclosure or other suit against him for the debt on account of the collection of such insurance by the mortgagee, is well settled: May on Ins., sec. 449; Flanders on Ins. 396; *Ely v. Ely*, 80 Ill. 532, 541; *Concord etc. Ins. Co. v. Woodbury*, 45 Me. 447; *Fox v. Phoenix Fire Ins. Co.*, 52 Id. 334; *Stinchfield v. Milliken*, 71 Id. 567; *White v. Brown*, 2 Cush. 412; *Loomis v. Eagle Life Ins. Co.*, 6 Gray, 401; *Haley v. Manufacturers' Ins. Co.*, 120 Mass. 296; *Dick v. Franklin Fire Ins. Co.*, 10 Mo. App. 385; *Louden v. Waddle*, 12 Ins. L. J. 289 (Penn.); *Archambault v. Galarneau*, 22 L. C. Jurist, 105. And where the mortgagee, having entered for condition broken, insures, and after a loss collects the insurance and makes repairs, on a bill by the mortgagor to redeem, he is not entitled to have the amount of the insurance deducted from charges made for the repairs: *White v. Brown*, 2 Cush. 412. The reason for this doctrine, that the mortgagor has no interest in an independent insurance, is, as stated in the principal case and in all the cases above cited, that such a contract of insurance is entirely distinct from the mortgage, and there is no privity between the mortgagor and mortgagee with respect to it. For precisely the same reason the mortgagee can not charge the mortgagor with the expense of such an insurance: *Faure v. Winans*, 14 Am. Dec. 545; *Saunders v. Frost*, 16 Id. 394; *Clark v. Washington etc. Ins. Co.*, 100 Mass. 512; *Dobson v. Land*, 8 Hare, 216.

5. *Insurer's Right of Subrogation on Payment.*—The question as to whether or not, in case of an independent insurance by a mortgagee upon his own account and for his own protection, the insurer, either before or after paying the loss, is entitled to be subrogated to the mortgagee's rights, as against the mortgagor, and to demand an assignment of part or all of the mortgage debt, is one upon which there is much conflict of opinion. Of course, if, as is generally the case, the policy expressly provides for such subrogation and assignment, the insurer's right thereto is unquestionable: *New England etc. Ins. Co. v. Wetmore*, 32 Ill. 221; *Stinchfield v. Milliken*, 71 Me. 567; *Dick v. Franklin Fire Ins. Co.*, 10 Mo. App. 376; *Springfield etc. Ins. Co. v. Allen*, 43 N. Y. 389; *Foster v. Van Reed*, 70 Id. 19, reversing S. C., 5 Hun, 321. So it seems, even though the premium for insurance is paid by the mortgagor: *Thornton v. Enterprise Ins. Co.*, 71 Pa. St. 234. And even though the policy does not provide for any subrogation or assignment, if the mortgage is in fact assigned to the insurer on payment, the mortgagor can claim no deduction from the debt on account of the payment of the insurance: *Concord etc. Ins. Co. v. Woodbury*, 45 Me. 447.

But if there is neither any provision in the policy for subrogation and assignment, nor any actual assignment, the insurer's right to demand it is not so clear. The doctrine of the principal case that the insurer is not entitled to demand such subrogation or assignment under a policy thus taken out

by the mortgagee, which does not expressly provide for it, is the established law of Massachusetts: *Suffolk Ins. Co. v. Boyden*, 9 Allen, 123; *Clark v. Wilson*, 103 Mass. 221; both approving the principal case. The question is discussed also, but not decided, in *Concord etc. Ins. Co. v. Woodbury*, 45 Me. 447, and the principal case is commented on with apparent approval. There are some strong arguments in the same direction in *Foster v. Van Reed*, 5 Hun, 321, but the case is not directly in point, and besides, the decision there made was reversed, as heretofore stated, in S. C., 70 N. Y. 19. And the doctrine of the principal case on this point seems to be adopted also in May on Ins., sec. 456; Wood on Fire Ins. 782, 783; and in later editions of Mr. Phillips' work: 2 Phill. Ins., sec. 1712. But it must be admitted that the decided preponderance of authority is against this doctrine, and in favor of the insurer's right of subrogation and assignment in such cases upon paying the loss, and if necessary, the balance due on the mortgage; and that the payment of the loss does not avail the mortgagor: *Flanders on Ins.*, 400, 401, and note; *Carpenter v. Providence etc. Ins. Co.*, 16 Pet. 495; *Honore v. Lamar Fire Ins. Co.*, 51 Ill. 409; *Norwich Fire Ins. Co. v. Boomer*, 52 Id. 442; S. C., 4 Am. Rep. 618; *Dick v. Franklin Fire Ins. Co.*, 10 Mo. App. 384; S. C., 10 Ins. L. J. 468; *Sussex etc. Ins. Co. v. Woodruff*, 2 Dutch. 541; *Kernochan v. New York etc. Ins. Co.*, 17 N. Y. 442; *Springfield etc. Ins. Co. v. Allen*, 43 Id. 389; *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 Id. 359; S. C., 14 Am. Rep. 271; *Rex v. Ins. Cos.*, 2 Phila. 357. This right of subrogation and assignment is based in many of these cases upon the alleged inequity of permitting the mortgagee to receive and retain both the insurance money and his debt, and upon the impolicy of allowing an insurance effected by the mortgagee to be thus turned into a sort of wager contract. The answer of Mr. Chief Justice Shaw in the principal case to these arguments is exceedingly strong. Another reason assigned for the doctrine is that the insurer, in such a case, stands in the relation of a *quasi* surety: *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343; S. C., 14 Am. Rep. 271. It is difficult to understand how anything like the relation of surety can exist where the liability of the principal, assuming the principal to be either the debtor or the property, arises under one contract, while that of the supposed surety arises under an entirely distinct and dissimilar contract, and at a different time. The liability under the mortgage is wholly independent of any question of loss; while the liability under the insurance contract attaches only in case of a loss. Such a case is entirely unlike that of an insurance of goods in the hands of a common carrier against a peril for which the carrier would be liable. There the insurer may be said to be in a certain sense a surety for the carrier, for the liability of both depends upon the same event, and if the insurer is compelled to pay, he is undoubtedly entitled to subrogation to the owner's remedy against the carrier: *Mead v. Mercantile Mut. Ins. Co.*, 67 Barb. 519; *Gates v. Hartman*, 11 Pa. St. 515; *Hall v. Railroad Cos.*, 13 Wall. 367. So in other cases where the assured has a remedy for his loss, not only against the insurer, but also primarily against the person who occasioned the loss. But it is bootless to pursue this subject where the weight of authority is so obviously and overwhelmingly the other way.

WHERE MORTGAGEE INSURES PURSUANT TO AGREEMENT with the mortgagor, or at his request and expense, the insurance is upon the property, and not upon the debt, and is for the benefit of both. The mortgagor is entitled to have the avails of the insurance applied in reduction of the debt, and the insurer paying the loss to the mortgagee is not entitled to subrogation to the latter's rights under the mortgage: May on Ins., sec. 449; *Concord etc. Ins. Co.*

v. *Woodbury*, 45 Me. 447; *Stinchfield v. Milliken*, 71 Id. 567; *Dick v. Franklin Fire Ins. Co.*, 10 Mo. App. 385; *Kernochan v. New York etc. Ins. Co.*, 17 N. Y. 428; *Waring v. Loder*, 53 Id. 581. And even though the mortgage, or a judgment of foreclosure founded thereon, should be actually assigned to the insurer, it would not avail him, except so far as it was unpaid by the insurance: *Waring v. Loder*, *supra*. An action will lie on such a policy for the benefit of the mortgagor, although the debt is paid: *Norwich Fire Ins. Co. v. Boomer*, 52 Ill. 442; S. C., 4 Am. Rep. 618. And if the debt is unpaid, the sufficiency of the property to pay it is no defense: *Aetna Ins. Co. v. Baker*, 71 Ind. 102; S. C., 10 Ins. L. J. 275, in which case it was held that the mortgagor could sue on the policy.

Where the mortgagor covenants to keep the premises insured and fails to do so, and the mortgagee insures in the mortgagor's name, making the loss payable to himself, he paying the premium, he may sue on it in his own name if it covers only the mortgaged property and does not exceed the debt: *Hopkins Mfg. Co. v. Aurora etc. Ins. Co.*, 48 Mich. 148. If the mortgagee, in such a case of failure of the mortgagor to insure as stipulated, insures "for whom it may concern," loss payable to himself, he may recover the whole loss, but must account for it towards the payment of the debt: *Fowley v. Palmer*, 5 Gray, 551. Generally, if a mortgagee insures in the owner's name, loss payable to himself, he is the party primarily insured: *Graham v. Phoenix Ins. Co.*, 17 Hun, 156; and he may recover the whole amount of the insurance if it is less than the debt: *Hadley v. New Hampshire Fire Ins. Co.*, 55 N. H. 110. Nor will a foreclosure after loss and before action defeat his recovery: *Id.* Where, without the mortgagor's knowledge, the mortgagee procures a policy to both, loss payable to himself, he paying the premium, he is the proper party to sue, and a prior insurance by the mortgagor, contrary to a condition in the policy sued on, will not defeat a recovery: *Westchester Fire Ins. Co. v. Foster*, 90 Ill. 121. The mortgagee is undoubtedly entitled to make premiums paid by him a charge on the premises where he insures pursuant to agreement or request, or upon the mortgagor's failure to insure according to stipulation: Ang. on Ins., sec. 444; Flanders on Ins. 398; *Mix v. Hotchkiss*, 14 Conn. 32; *Fowley v. Palmer*, 5 Gray, 549, 550; *Dobson v. Land*, 5 De G. & Sm. 575. Nor can the mortgagor claim of the mortgagee a return of a premium paid by him where the policy is canceled, unless he shows the mortgagee has received it back from the insurers: *Parker v. Smith Charities*, 127 Mass. 499.

WHERE MORTGAGOR INSURES OWN INTEREST WITHOUT AGREEMENT with the mortgagee, and for his own protection, the mortgagee has no claim at law or in equity to have the insurance money applied upon the debt: May on Ins., sec. 449; Ang. on Ins., sec. 60; 1 Phill. Ins., sec. 296; 2 Id., sec. 1962; Flanders on Ins. 396; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 512; *Ryan v. Adamson*, 57 Iowa, 30; *Stearns v. Quincy Mut. Ins. Co.*, 124 Mass. 61; *Ames v. Northwestern Manufacturers' Ins. Co.*, 11 Ins. L. J. 677 (Minn.); *Carter v. Rockett*, 8 Paige, 437; *Dunlop v. Avery*, 23 Hun, 509; *Stamps v. Commercial Fire Ins. Co.*, 77 N. C. 209; S. C., 24 Am. Rep. 433; S. C., 7 Ins. L. J. 256; *McDonald v. Black's Adm'r*, 20 Ohio, 185; *Nichols v. Baxter*, 5 R. I. 491.

IF MORTGAGOR INSURES PURSUANT TO AGREEMENT with the mortgagee to keep the premises insured, the mortgagee has an equitable lien upon the insurance money, in case of loss, to the extent of his insurable interest, and is entitled to have it applied in discharge of the debt: Ang. on Ins., sec. 62; *Thomas' Ex'rs v. Von Kapff's Ex'rs*, 6 Gill & J. 372; *Carter v. Rockett*, 8 Paige, 437; *Nichols v. Baxter*, 5 R. I. 491; *Wheeler v. Factors' etc. Ins.*

Co., 101 U. S. 439; *In re Sands' Ale etc. Co.*, 3 Biss. 175. So though there is a clause authorizing the mortgagee to insure: *Wheeler v. Factors' etc. Ins. Co.*, 101 U. S. 439. So though the mortgage stipulates that the insurance money, in case of a loss, shall be devoted to rebuilding, and a loss happens, and the insurance is paid but is not devoted to rebuilding but deposited in bank, and the performance of the stipulation to rebuild becomes impossible, where the mortgagee forecloses and the property proves insufficient to pay the debt: *Thomas' Adm'rs v. Von Kapff's Ex'rs*, 6 Gill & J. 372. So, it seems, though the policy does not mention the mortgagee and the insurance is without his knowledge, and is effected prior to the mortgage: *Ames v. Northwestern Manufacturers' etc. Ins. Co.*, 11 Ins. L. J. 677. Where a mortgagor covenants to keep the premises insured for the benefit of the mortgagee, the presumption is that any insurance effected by such mortgagor is in performance of the covenant, and the mortgagee has his lien: *Dunlop v. Avery*, 23 Hun, 509. Not so, however, where the policy is actually made payable to a subsequent mortgagee who has a similar covenant in his mortgage and has no actual notice of the covenant in the prior mortgage: *Dunlop v. Avery*, 89 N. Y. 593, reversing S. C., 23 Hun, 509; nor where the covenant is to insure for the mortgagee's benefit in a certain sum, in a company to be approved by the mortgagee, if the mortgagor insures for his own benefit, for a less sum without the mortgagee's knowledge, and the insurer having had no notice of the terms of the mortgage, pays the money to the mortgagor notwithstanding a claim interposed by the mortgagee: *Stearns v. Quincy Mut. Fire Ins. Co.*, 124 Mass. 61; nor where the mortgagor conveys to another after the mortgage and the latter insures, unless he makes the policy payable to the mortgagee: *Reed v. McCrum*, 91 N. Y. 412; nor where a subsequent mortgagee, having no knowledge of the covenant, insures for his own protection: *Wheeler v. Factors' etc. Ins. Co.*, 3 Woods, 43.

Where, on an insurance by and in the name of the mortgagor, the loss is made payable to the mortgagee, it seems clear that the mortgagee may sue on the policy in case of a loss: Ang. on Ins., sec. 60; *Motley v. Manufacturers' Ins. Co.*, 50 Am. Dec. 591; *Hartford Fire Ins. Co. v. Olcott*, 97 Ill. 439; *Coates v. Pennsylvania Fire Ins. Co.*, 58 Md. 172; S. C., 42 Am. Rep. 327; *Berthold v. Clay etc. Ins. Co.*, 2 Mo. App. 311; *Roussel v. St. Nicholas Ins. Co.*, 9 Jones & S. 279; *Cone v. Niagara Fire Ins. Co.*, 60 N. Y. 619; *Appleton Iron Co. v. British America Ins. Co.*, 46 Wis. 23; *Hammel v. Queen Ins. Co.*, 50 Id. 240; *Brush v. Aetna Ins. Co.*, 1 Oldright (Nov. Scot.), 459. Certainly so, if the insurance is pursuant to a stipulation for insurance: *Hartford Fire Ins. Co. v. Olcott*, *supra*; and, in any event, the bringing of the action by the mortgagee is a ratification of the contract: *Berthold v. Clay etc. Ins. Co.*, *supra*. Where on such a policy the loss is made payable to the mortgagee "as his interest shall appear," his right to sue alone is said, in *Hammel v. Queen Ins. Co.*, *supra*, to depend upon whether the mortgage debt exceeds the sum insured. The extent of the recovery by the mortgagee upon a policy procured by the mortgagor, loss payable to the mortgagee, is held to be the whole amount of the loss if it does not exceed the mortgage debt: *Motley v. Manufacturers' Ins. Co.*, *supra*; *Berthold v. Clay etc. Ins. Co.*, *supra*. In other cases it is held that the mortgagee may recover the whole loss, holding the residue beyond his mortgage interest in trust for the mortgagor: *Cone v. Niagara Fire Ins. Co.*, *supra*; *Graves v. Hampden Ins. Co.*, 10 Allen, 283. If, by the policy, the mortgagor retains an interest beyond the control of the mortgagee, as where the property covers other property than that mortgaged, it is held, in *Hartford Fire Ins. Co. v. Davenport*, 37 Mich. 609, that the

mortgagee can not sue on the policy. Where the insurance is in a mutual insurance company, and the policy is issued to the mortgagor, he giving the premium notes, although the loss is made payable to the mortgagee, it is held, in *Blanchard v. Atlantic Mut. Fire Ins. Co.*, 33 N. H. 9, that the action must be in the name of the mortgagor.

Ordinarily where a mortgagor procures a policy to be issued to himself, loss payable to the mortgagee, although the latter may have a right of recovery on the policy, the former is the "assured," and any violation by him of the conditions of the policy by alienation, "other insurance," or the like, will defeat the mortgagee's right of action as well as that of the mortgagor: *Continental Ins. Co. v. Huffman*, 92 Ill. 145; *Brunswick Sav. Inst. v. Commercial Union Ins. Co.*, 68 Me. 313; *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391. So where the insurance is originally to the mortgagor, but by indorsement the loss is made payable to the mortgagee: *Franklin Sav. Inst. v. Central Mut. Fire Ins. Co.*, 119 Mass. 240; *Loring v. Manufacturers' Ins. Co.*, 8 Gray, 28. But where the policy expressly provides that no violation of its conditions by the mortgagor shall affect the mortgagee, the latter may recover to the extent of his own interest, notwithstanding any such violation: *Hartford Ins. Co. v. Olcott*, 97 Ill. 439; *City Five-cent Sav. Bank v. Pennsylvania Fire Ins. Co.*, 122 Mass. 165; *Phoenix Ins. Co. v. Floyd*, 19 Hun, 287; *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y. 141.

MAY v. BREED. NORRIS v. BREED.

[7 CUSHING, 15.]

LAW OF PLACE WHERE CONTRACT IS MADE and to be performed governs not only as to its execution, authentication, and construction, but also as to the legal obligations arising from it, and as to what is to be deemed a performance, satisfaction, or discharge.

DISCHARGE UNDER BANKRUPT LAW OF FOREIGN COUNTRY of an acceptor of a bill drawn in Massachusetts, where the drawer and payee resided, but accepted and made payable in such foreign country, the acceptor being a resident there, is a bar to an action against him in Massachusetts, though the claim was not proved under the bankruptcy; *a fortiori* if it was so proved.

ASSUMPSIT. The facts in the first case above named appear from the opinion.

S. E. Sewall and R. Choate, for the plaintiffs.

W. Dehon and C. G. Loring, for the defendants.

By Court, SHAW, C. J. This case comes before the court upon an agreed statement of facts. It is *assumpsit* by the plaintiffs, as payees, against the defendants, as acceptors of a bill of exchange for one thousand pounds sterling, dated at Boston, May 30, 1839, requesting the drawees to pay that sum to the plaintiffs, or their order, in London, drawn by Ebenezer Breed, payable in sixty days. This draft was addressed to the defend-

ants, R. F. Breed & Eccleston, at Liverpool, and by them accepted, payable at a banking house designated, in London. It was presented at maturity for payment; but payment being refused, it was protested for non-payment. The defendants were partners and resident merchants, carrying on business at Liverpool, when the bill was drawn and accepted. R. F. Breed was a native of Massachusetts, born in 1781, and resided here till 1804; he then went to England, where he has ever since resided, and carried on business as a British subject, and he still lives there. Eccleston, the other defendant, was a British subject, and, as we understand, a native. The bill was sold by Ebenezer Breed, the drawer, to the plaintiffs in Boston. The plaintiffs were resident merchants in Boston, when the bill was drawn, and have ever since continued so. Ebenezer Breed, the drawer, was also a citizen of Massachusetts when the bill was drawn. The defense relied upon is, that R. F. Breed & Eccleston, the defendants, acceptors of the bill, were declared bankrupt, and obtained their certificate of discharge under the English bankrupt law, the certificate having been granted February 24, 1841. The plaintiffs did not prove their debt, under the commission of bankruptcy, against the estate of R. F. Breed & Eccleston, and have received no dividend thereon. Two dividends have been declared and paid to other creditors, who have proved their claims, and the settlement of the estate is not yet closed.

We have transcribed nearly the entire statement of facts agreed, it being short, and every fact mentioned being significant and material. The question is, whether the plaintiffs, resident citizens of Massachusetts, shall be barred of their action in the courts of this commonwealth, by a discharge from their debts duly obtained by the defendants, under the bankrupt laws of Great Britain.

It is very clear, upon these facts, that the contract, for breach of which a remedy is sought in this action, was made in England, and to be performed in England. The contract between these parties was the contract made by the acceptance of the defendants, to pay the sum drawn for; the bill was presented to them for acceptance by the plaintiffs or by some person acting as their agent; it was thereupon accepted; and so the contract made in England. It was expressly made payable in London. The case, therefore, upon the facts, is entirely clear of doubt, plain and simple; it is a contract made in England, and to be performed in England, by persons residing and carrying on business in England, with a foreigner, acting therein, by himself, or his agent, in England.

Shortly after the making, and before the performance on this contract, the debtors were placed under a commission of bankruptcy, an adversary proceeding, under and by virtue of the laws of England, against a defaulting trader, upon doing certain acts indicative of present or impending insolvency. These laws provide, generally, that upon a trader's doing certain acts, considered acts of bankruptcy, a creditor may apply for and obtain a commission, under which the whole of the trader's property is sequestered and taken into the custody of law, to be administered by officers appointed for that purpose, the proceeds of which, with some slight exceptions, are appropriated to the payment of all the bankrupt's debts, if sufficient therefor, otherwise to pay them in equal proportions, as far as it is sufficient for that purpose. The same law further provides, that if the bankrupt will honestly and faithfully co-operate in the proceeding, if he will disclose all his property and effects, and aid the officers appointed for that purpose by information and by all means in his power, and do all the duties required of him in the premises, he shall be absolved and discharged of all his debts, and receive a certificate, as the authoritative evidence of his right to such discharge. Such were the proceedings instituted against these defendants, in their own country, under the laws of their own country; such was the discharge which they obtained; and they insist that this is a good discharge against a debt previously contracted in that country, due and owing at the time of these proceedings, and which might have been proved under such commission, and in respect to which a dividend might have been received by the creditors. They also insist that this was a discharge of the debt created by that contract, that it no longer existed as a debt, and that this discharge is therefore a good defense to an action seeking to recover such debt, in whatever country, court, or tribunal such action may be brought.

In the present case, no question can arise as to the place or country to which we are to look for the law, which is the *lex loci contractus*. A difficulty often arises, and cases become exceedingly complicated (in consequence of the transaction being more or less affected by the laws of various countries), in determining which and in what proportion each shall govern; as, for instance, where the contracting parties belonging to different countries, enter into a contract in a third, perhaps to be executed in a fourth, and where a remedy is sought in a fifth. In the present case, beyond question, the law of England is the

law of the contract, whatever may be the effect of that law upon the rights and duties of these parties.

1. It seems to be now a well-settled rule of law, generally adopted by the courts of all civilized nations, that the law of the contract is to govern it, and determine the rights of parties under it, in all matters touching the modes of execution and authentication of the form or instrument of contract; and also in relation to the use and meaning of the language in which it is expressed, the construction and interpretation of it, and the legal duties and obligations imposed by it, and the legal rights and immunities required under it.

It has sometimes been made a question, whether the existing law of the country, where a contract is made, by tacit consent of the parties enters into and makes part of the contract, so as to derive its force and obligation from consent; or whether it is the law which follows, accompanies, and regulates the construction of the contract, as a law to which both owe obedience. Perhaps both these considerations have their influence and effect, in applying the rule of the *lex loci contractus*, and depend in some measure upon the terms of the contract itself. So far, it depends upon the use and meaning of language, whether it be used in a popular, legal, or technical sense, and the force and effect of the terms used, and the parties may be presumed tacitly to assent to and be bound by the law of the place. Thus, if one give a promise to pay a hundred dollars in sixty days, if this be in the form of a promissory note, by custom, operating in effect as a law, it creates an obligation to pay in sixty-three days. But provisions of law of another character, affecting not the words of the contract, but the mode of making and obtaining satisfaction, as they do not spring from the language of the contract, and would not ordinarily be a subject of express provision by contract, may be considered as governing the contract, not by consent, but by force of law. As, for instance, a mortgagor stipulates that the mortgagee shall have the land mortgaged, absolutely, if the debt is not paid at the time stipulated; but the law of the contract, the only law which can govern it, comes in and declares that the title shall not be absolute, but conditional, although the debt is not paid at the time stipulated.

This, however, as to the mortgage affecting the realty, may be considered as governed by the *lex loci rei sitæ*; but the same rule would apply in some cases of personal stipulation. As where a man binds himself to another, in the sum of one hun-

dred dollars, the obligation to be absolute if the obligor does not pay fifty dollars in one year, the law makes it a debt for the smaller sum only. In both of these cases, we suppose, there is no doubt but the law of the contract would govern it, and it would not be competent for the parties, by any stipulation of their contract, to vary the law in this respect. The rule, therefore, that the *lex loci contractus* shall govern is derived partly from the presumed consent of the parties, and partly from that law to which both are subject, and to which both for the time being owe obedience. The contract must be governed by some law, and, no other being referred to, it must be the law of the place.

A question has sometimes arisen, whether the obligation of a contract, made in one country, to be performed in another, arises from the force and effect of the municipal law, either of the place of making or that of performance; or from that universal law of moral obligation, acknowledged by all men above the condition of barbarism, and admitted and carried into effect by the comity of all civilized nations. This may be a difficult and delicate question, in expounding that clause in the constitution of the United States which prohibits the respective states from passing any laws impairing the obligation of contracts. The construction of this clause may be affected by a consideration of all the provisions of the constitution, of the relative powers intended to be vested in the United States, or reserved to the several states, of the condition of the legislatures of the several states, when they existed as British provinces, and by many considerations not affecting the general question. But if the question were, generally, whether the obligation of a contract is derived exclusively from moral duty and natural obligation, independently of positive law, or from the positive law of the place where it is made, to the exclusion of the moral duty and natural obligation, the controversy would be inconclusive, and lead to no result. We think it would be more correct to say, that each of these considerations has some influence, and that both municipal law and moral obligation concur in constituting the legal obligation of a contract. And this is true, as well in regard to contracts made and to be executed within the state or country where the remedy is sought, as to those which are to be executed, or where the remedy is sought, in a state or country where the contract is not made. Universal law and natural obligation on the one hand, and municipal law on the other, are not antagonistic to each other. On the contrary,

municipal law assumes the existence of moral duty, arising from natural law, and regulates it, so that it may form a plain and practical rule, adapted to the exigencies of a civilized community.

Natural law and moral duty, acknowledged by all enlightened men, and by the dictates of conscience, must bind men to keep faith and perform all engagements. But this duty is not precise and exact enough to form a practical rule for the government of men in society, in the various exigencies daily occurring. For instance, the law of nature requires that a person competent, in point of age, to make a promise or contract shall be bound by it. But it does not approach to the determination of the question, What shall be the age of majority? It may well decide that an infant of tender years can not contract, and that a person of mature years shall be bound by his promise. But between these extremes there is a wide range, within which it requires the positive law of society to provide a precise limit. Shall it be at twenty-one, eighteen, or twenty-five, or at what age? By the law of England a person is competent to contract for necessities before twenty-one, but not to make contracts generally until that age. Here the law of moral obligation combines with the positive law of the country to constitute the obligation of the contract, holding him bound if made after twenty-one, and not before, unless for necessities. This then must be recognized as the law of the contract.

So the law of moral obligation binds one to perform his promise to pay a certain sum of money, without designating time or place. Positive law must determine what constitutes the thing called money, whether it be a particular denomination of coin, or money of account, or what shall be deemed its equivalent in other coin, all of which are in a high degree artificial and conventional. So it must determine the time and place at which payment shall be due, when and under what circumstances interest shall be paid, the rate of interest, when it shall commence, and the like.

Suppose the law of France fixes twenty-three or twenty-five as the age of majority and competency to contract, and an Englishman should be sued in France on a pecuniary contract made in England at twenty-two, would it not by the comity of nations be enforced in France, although the contract derives its obligation partly from the law of natural obligation, and partly from the positive or municipal law of the place of contract? It seems to be agreed on all hands, that contracts made in contravention

of a law of the country, such as contracts for the payment of gaming debts and usurious loans, are void; although perhaps a rate of interest allowable by the laws of some countries, but exceeding the rate allowed by the law of the country in which the contract is made, can hardly be said to be contrary to the dictates of moral obligation; and therefore, if moral obligation, and not the law of the place of contract, were to govern, it ought to be carried into effect when a remedy is sought elsewhere than in the tribunals of the place of contract.

As to the rule upon this subject, considering it upon general principles, without reference to the constitution of the United States, or the restrictions upon the authority of the respective states to pass insolvent or bankrupt laws, but regarding it as a question of the application of foreign laws amongst sovereign states, we think the rule is well expressed by Chief Justice Parker in the case of *Blanchard v. Russell*, 13 Mass. 1, 4 [7 Am. Dec. 106]. For though this case has been at times considered as overruled, in regard to the operation of a discharge under an insolvent law of one of the United States, yet we think the general principles advanced have been repeatedly recognized as sound law. After suggesting that laws can not by their intrinsic force operate extraterritorially, but that the curtesy, and comity, and convenience of nations between whom commerce exists, has sanctioned the admission and operation of foreign laws relative to contracts, he adds: "So that it is now a principle generally received, that contracts are to be construed and interpreted according to the laws of the state in which they are made, unless from their tenor it is perceived that they are entered into with a view to the laws of some other state. And nothing can be more just than this principle. For when a merchant of France, Holland, or England enters into a contract in his own country, he must be presumed to be connusant of the laws of the place where he is, and to expect that his contract is to be judged of and carried into effect according to those laws; and the merchant with whom he deals, if a foreigner, must be supposed to submit himself to the same laws, unless he has taken care to stipulate for a performance in some other country, or has in some other way excepted his particular contract from the laws of the country where he is."

We consider this doctrine so clear upon principle, and so firmly established by authorities, that it is not necessary to review the series of authorities which might be cited to sustain it.

2. But there is another question more difficult and important,

necessary to be considered in determining the present case, affecting the satisfaction and discharge of a contract by anything short of an actual performance of the thing stipulated to be done. As to the law regulating remedies, it is as clearly settled, and upon most satisfactory grounds, that every case must be governed by the law of the place where the remedy is sought. What species of process a creditor may have by arrest of the person, attachment or sequestration of real or personal property, the time, place, and manner in which and the tribunal before whom suit may be brought, are all regulated by the *lex fori*. The time within which an action may be brought, with all exceptions and qualifications, falls under the same head, which must, of course, include all statutes of limitation. But there is a large class of cases falling under neither of these extremes, that is, not depending on construction or interpretation, and still not affecting the mere matter of remedy. We allude to the numerous laws regulating the execution and performance of contracts where an exact and specific performance becomes impossible; what shall be deemed and taken to be a good substituted performance? or what shall be the nature and the measure of compensation where the contract is not performed? Indeed, there are few cases where the law can enforce a precise and specific performance of the very thing stipulated to be done; and where it can not, what law shall determine the equivalent, measure of damages, or substituted performance? Even under the mere law of nature such cases must occur. An Indian hunter has agreed with another to deliver a given number of carcasses of venison, after the hunting season; but the deer have been all driven away or have perished by disease, and the venison can not be obtained. But the debtor has been successful in fishing, and has an abundant supply; what, then, does the law of natural justice require him to do, in the performance of his contract? Is it not to deliver to his creditor a quantity of fish equally valuable and useful with the promised venison? And will not the same law regard this as a reasonable satisfaction? In a further advanced state of civilization, a farmer has stipulated to deliver to a trader a fixed number of bushels of wheat, at harvest, and the wheat is blighted and the harvest fails; what laws shall decide what sum of money, or what amount of other produce, the farmer shall deliver as an equivalent? In the early history of Virginia, contracts were made generally to pay in tobacco. Suppose there was a law of the place that, upon the failure of the crops of tobacco, a given number of bushels of corn should be deemed

equivalent to a given number of pounds of tobacco, and should be received as a substitute; would not this law regulate such a contract, either as a tacit condition annexed to it by the parties, or because it was a law to which the parties both owed obedience, and subject to which they must have been presumed to contract?

It appears to us that these laws, affecting as they do the nature and character, the force and obligation, of the contract, deciding to what extent it binds the parties in all the various contingencies which may occur, what shall be deemed actual and specific performance, or qualified and substituted performance, or satisfaction for non-performance, are all incidents of the contract. They are not to be governed by the law which affords judicial remedies, legal or equitable, but are to be governed by the law of the contract, whether it be the law where the contract is made, or where by its terms or legal effect it is to be performed.

We again recur to the language of Chief Justice Parker in the case of *Blanchard v. Russell*, *supra*. After remarking that we must look beyond the law regulating the interpretation of a contract to find the grounds upon which it may be discharged, he says: "We think it may be assumed as a rule affecting all personal contracts [made by the subject of one country in another], that they are subject to all the consequences attached to contracts of a similar nature by the laws of the country where they are made, if the contracting party is a subject of or resident in that country where it is entered into, and no provision is introduced to refer it to the laws of any other country." He then puts, by way of illustration, the precise case now before us, as follows: "Thus, if an American merchant becomes the creditor of an English merchant in England, and the English merchant becomes bankrupt, and obtains a certificate of discharge, the American merchant will be concluded by such certificate; for it is reasonable to suppose that both parties knew of the existence of the bankrupt laws of England, and the contract must be presumed to have been made with reference to those laws. Indeed, merchants doing business abroad are always supposed connusant of the laws of the place where they transact their business, and to submit themselves to such laws, and even to such customs as are found there to exist."

The case thus put is directly in point, so far as the question turns upon what may be regarded as the international law upon this subject, as it operates upon contracts, and governs the administration of the laws between sovereign states. So far as

that case turned upon the effect of an insolvent law of one of the United States, acting under the restrictions imposed upon state legislation by the constitution of the United States, its authority has been shaken by subsequent decisions.

We perceive, also, in this case, the ground upon which the principle is founded. It is this, that the law of the place of the contract, which may be called the law of the contract, gives it its character, makes it what it is, fixes its limits and obligation, fixing the time when it shall commence, how it shall be executed or satisfied, and how it shall be terminated and discharged. When, therefore, such a contract is discharged, by force of the same law which gave it its origin and effect, it is extinguished, and no longer exists as a contract. When, therefore, a remedy is sought upon it in the tribunals of another country, the same international comity which permits the creditor to demand damages for its non-performance ought to permit the defendant to show that the obligation no longer exists. The law under which such discharge is obtained can hardly be said, in such case, to have an extraterritorial operation; it operates within the country where the contract was made, in fixing its character and legal effect, which, upon the happening of the contemplated contingency, puts an end alike to its obligation and to its execution.

All sovereign states have authority to regulate their own currency. Suppose the English government, after a debt contracted in England by an Englishman with an American, had passed a law reducing the currency, or increasing the nominal value of gold, so that the number of pounds sterling contracted for could be paid by a less weight of gold, and the American creditor, under protest, and because he could not do otherwise, should receive his debt in the reduced currency, on finding his debtor here, could he sue him and recover the deficiency? We think not; the contract would have been fully satisfied, according to the law of the place of its creation, and of course would be at an end. If, indeed, a law should be passed manifestly fraudulent and colorable in this respect, courts of another country, not bound absolutely by the laws of such country, operating *proprio vigore*, but so far only as comity requires, may refuse to carry such unjust law into effect. So, where an insolvent law is so framed as in effect and in practice to exclude foreign creditors from availing themselves of the benefit of it, they shall not be bound by it: *Prentiss v. Savage*, 13 Mass. 20.

We are of opinion that the weight of authority is in favor of

the position, that the discharge of a contract by the law of the country in which it was made and to be performed, by a law providing for the appropriation of all one's property for the payment of all his debts, and if insufficient for an equal distribution, must be considered as determining the contract by the same species of force by which it was formed, *eo ligamine quo ligatur*, and therefore, that it no longer exists. I shall not now review the authorities critically, but only refer to a few of the leading cases. It seems to be conceded by the learned and copious arguments of the plaintiffs, that the English authorities are to this effect. Among the most prominent are *Ballantine v. Golding*, 1 Cooke B. L., 8th ed., 487; *Potter v. Brown*, 5 East, 124; *Smith v. Buchanan*, 1 Id. 6; Story's Conf. L., sec. 340. We are of opinion that the weight of American authority is the same way: *Mather v. Bush*, 16 Johns. 233 [8 Am. Dec. 313]. In this case it was held that the obligation of a contract is affected by the law of the place where it is made; and that, as a consequence, that law, by determining its legal effect, determines the obligation. It is placed on the ground that the law of the place of the contract, when it is made and to be performed in such country, not only creates and gives effect to the obligation and duty imposed by it, but determines by what act it shall be deemed paid, satisfied, released, discharged, or extinguished. Chancellor Kent's decision, in *Hicks v. Hotchkiss*, 7 Johns. Ch. 297 [11 Am. Dec. 472], is a clear decision that, where the case is not affected by the constitution of the United States, a discharge under a bankrupt law legally granted in the state or country in which the contract is made and to be executed, such law having existed and been in force when the contract was made, extinguishes the contract. "A contract can not," says the learned judge (p. 308), "create a civil obligation in a mode not permitted, and to an extent beyond that prescribed by the established law of the land existing when the contract is made." In a very recent case in Maine, *Very v. McHenry*, 29 Me. 206, the same principle is affirmed and adopted.

Without going into a more extended review of the decisions of state courts, we are of opinion that this decision is not opposed by the authority of the supreme court of the United States, as stated in the leading and most elaborate case of *Ogden v. Saunders*, 12 Wheat. 213. It was most ably and fully argued by eminent counsel; it was argued several times, not only with the keenest legal discrimination, but with the closest metaphysical acumen, and every argument brought to bear

which could be supposed to have any effect on the question. But, after all, the question turned upon the effect of a discharge under an insolvent or bankrupt law subsisting in one state in respect to a contract made in that state, and to be performed there, of which state both parties were citizens at the time the discharge was obtained, but where the discharge was pleaded and relied upon as a defense to a suit brought on such contract in the circuit court of the United States, sitting in another state. We think it was discussed and decided upon principles growing out of the relations subsisting between the governments of the several states and that of the United States, and the relative powers of each; the limited powers of sovereignty of the respective states, with an unlimited power of legislation over certain subjects, and the absolute power vested in the government of the United States over other subjects; the latter being supreme to the extent to which it is conferred. It turned, therefore, upon the terms and construction of the constitution, distributing these powers of legislation and government, and imposing an express limitation upon the legislation of the several states upon certain subjects. There was an extraordinary conflict of opinion amongst the judges who decided the case. They all were of opinion that, notwithstanding the constitution of the United States authorizes the general government to pass a uniform bankrupt law, yet that the several states still had the power to pass an insolvent law, so far as it could be done, without coming in conflict with the provisions of the constitution, or the laws actually made by congress in pursuance thereof. The question was as to the nature and limits of such power, and the objects and purposes to which it might extend. When a uniform system of bankruptcy, under a law of the United States, is actually in force, to the extent to which reaches, it must of necessity suspend state laws, because they would be repugnant.

If it extended to merchants only, the states might make laws of insolvency in respect to other classes of debtors; and so in regard to all subjects and persons not reached by the United States bankrupt law. Three judges were of opinion that the law in force where a contract is made gives character and effect to the contract, either as tacitly referred to by the parties, or as accompanying and governing the contract; that such a law, providing how, on certain contingencies, it should cease and become inoperative, as upon his becoming insolvent and surrendering his property, would affect the contract itself, and

therefore, if this were discharged by force of the same law by which it was created, the discharge would put an end to the contract, and be available ever after as a defense, in whatever state the creditor might seek to enforce it; and that the discharge in the case then in judgment was a bar. Three judges were of opinion, considering the relations amongst the several states when the constitution was adopted, the purpose to establish a more perfect Union, to provide a more general and controlling system of distributive justice, in the great relations of debtor and creditor, over the whole Union, and that an insolvent law of each state could not, *proprio vigore*, operate extraterritorially, and thus accomplish the great purpose of uniformity contemplated, that, when the constitution of the United States provided for establishing a uniform bankrupt law, and at the same time prohibited the states from making any law impairing the obligation of contracts, the effect was to restrain the states respectively from passing any law which would forever, and under all circumstances, exonerate one from further liability on his contracts; and, therefore, that a state insolvent law, purporting to give such a discharge, was unconstitutional and void, when attempted to be enforced beyond the limits of such state. One judge was of opinion that such insolvent or bankrupt law was constitutional and valid, yet affected the remedy only, and not the contract, and therefore afforded no defense to a suit brought in another state, or in the courts of the United States. Four judges ultimately united in holding the discharge in that case void.

The result, we think, is not opposed to the decision in this case, upon the effect and operation of the bankrupt law of England, on a contract made and to be executed there, and discharged by the operation of an act of parliament existing when the contract was entered into, and having the full force over the persons contracting, to the extent to which any law could affect the contract. The case of *Ogden v. Saunders*, 12 Wheat. 213, affected only the discharge obtained under a law of a state with limited powers, and in that case some of the judges held that the general power was expressly restrained. It seems to us that, could the law have been regarded as general and unrestrained by the constitution of the United States, they would have concurred in the opinion that the discharge would have been valid.

3. It is then argued that such can not be the rule, because the assignee of a foreign bankrupt can not come here and claim the property and choses in action of the bankrupt. We have

been strongly pressed by the argument that, inasmuch as assignees of an English bankrupt can not sue for and recover debts due the bankrupt, therefore the bankrupt law has no extraterritorial operation, and can not give effect to a certificate of discharge, when set up here in bar by an English bankrupt. But we can not perceive the force of this reasoning. The two things are not irreconcilable; they stand on different grounds, and depend on different and distinct principles. Though the point has been long doubted, we consider it as now settled by a preponderance of authority, that, when a debt due by an American merchant to an English bankrupt is attached by an American creditor of the English bankrupt, by a trustee process, or process of foreign attachment, the assignees of the English bankrupt can not come in and interpose such assignment to defeat such attachment, and claim the assets as by a prior title: *Le Chevalier v. Lynch*, 1 Doug. 170; *Blake v. Williams*, 6 Pick. 286 [17 Am. Dec. 372]; *Holmes v. Remsen*, 4 Johns. Ch. 460 [8 Am. Dec. 581]; S. C., 20 Johns. 229 [11 Am. Dec. 269]; 2 Kent's Com. 405. But this is the extent to which the authorities go. It by no means follows, that the English bankrupt law has no effect here. On the contrary, we think it would enable the assignees to take possession of, and appropriate to the use of the creditors, personal property not attached or otherwise subject to any lien under our laws, and also to collect and receive all moneys due the bankrupt, and give a good discharge therefor, and sue for and recover them, either in their own name or in the name of the bankrupt, if not attached or held by any process or lien, by any other creditor. It was so admitted we think, by implication and in effect, in *Blake v. Williams*, *supra*. Our law recognizes the rule that rights to personal property, including debts, are to be disposed of according to the law of the domicile of the owner, as well *inter vivos* as in case of the owner's decease; but as this law can operate beyond the country of the owner only by comity, it is taken with this limitation, that it shall not operate injuriously to the citizens of the state whose laws are invoked to carry it into effect: *Dawes v. Head*, 3 Pick. 128; *Blake v. Williams*, 6 Id. 286 [17 Am. Dec. 372]. So the title of the assignees, both to personal property and choses in action, is recognized and admitted so far as it can be without affecting injuriously the claims of domestic creditors. But then comes in another well-established principle, that every government may by positive law regulate and direct as it pleases all personal property found within its jurisdiction; and may therefore prefer

its own attaching creditors to the claims of any foreign assignee, and no other state has authority to question its determination.

In the opinion of Chancellor Kent, in the case of *Holmes v. Remsen*, 4 Johns. Ch. 460 [8 Am. Dec. 581], he remarks upon the apparent inconsistency in practice, on this subject, as it has been alleged, which will give effect to the assignment, and not give effect to the certificate. But admitting that there is a want of harmony in this respect, he adds, "it will not affect the binding force of the rules taken separately." And we think the obvious reason is, that they are drawn from separate sources, and the admission or rejection of the one does not involve the admission or rejection of the other. Considering, therefore, what the weight of authority now is, to which Chancellor Kent, contrary to his opinion in *Holmes v. Remsen*, now assents, 2 Kent's Com. 405, that the assignee of a foreign bankrupt will not have a right to defeat the attachment of a domestic creditor, made in conformity with the laws of his own state, it is founded on the principle that the foreign assignee can claim to sue here, not by positive law, but by comity only, and that this comity will not be yielded when it would tend to injure the citizens of the state where the remedy is sought, and that every state has both the right and the power to control and regulate personal property found within its limits; and having given such rights to its own citizens, they shall not be taken away by the application of the principle of comity. This principle is entirely distinct from that which gives effect to the certificate of discharge of a bankrupt against a debt contracted in the country of the bankrupt, and to be executed there.

4. It is objected to the admission of this certificate, under the principle of comity, that the English bankrupt law is unequal and unjust. It is said to be unequal, because it gives a preference to certain debts due the crown, to be paid in full. To this there are two answers: 1. This principle, of the priority of a public debt, is common to all bankrupt and insolvent laws, also in case of deceased insolvents; and, 2. Foreign creditors are put on the same footing of equality with English creditors. It is then said that the law is unjust in giving a discharge of the entire debt without full payment. The first answer is, that it provides for the payment of the debts in full, if the funds are sufficient for that purpose. If they are not paid in full, it is because it is impossible. *Ad impossibilia lex non cogit*. It is amongst the contingencies known when a debt is contracted, that the debtor may be unable to pay it, and in that

event, full payment is not to be expected. The whole effect of the law, then, is (for it takes all the debtor's property), to except his future earnings and acquisitions. But this is only on condition that he will surrender all his property, and faithfully co-operate with his creditors, to pay as far as possible. Taken as a system, it may well be maintained that such a system is favorable to creditors, and affords them the best means of obtaining satisfaction. Especially is this beneficial to foreign creditors, who, not being on the spot, can not use the same diligence to collect their debts as domestic creditors.

It is said the constitution of the United States holds it immoral, because such a law impairs the obligation of contracts. Even as expounded by a majority of the judges, in the case of *Ogden v. Saunders*, 12 Wheat. 213, the power is, for wise purposes, prohibited to the respective states; but it is, in terms, given to the United States, and no doubt because, being uniform over all the states, it would be more extensive in its operation, and of course more beneficial. The constitution could not grant in one clause a power, the exercise of which is denounced as unjust in another.

Judgment for the defendants.

The case of *Norris v. Breed* was the same as the foregoing, except that the plaintiff had proved his claim and received dividends under the bankruptcy.

S. E. Sewall, for the plaintiff.

C. G. Loring and W. Dehon, for the defendants.

By Court, SHAW, C. J. The certificate of discharge, being held a good defense where the American creditor had not proved his debt, *a fortiori* is it so against a creditor who has proved his debt and taken dividends.

FLETCHER, J., did not sit in this case.

LAW OF PLACE OF MAKING OR PERFORMANCE OF CONTRACT, how far governs: See *Hale v. New Jersey Steam Nav. Co.*, 39 Am. Dec. 398; *Jordan v. Thornton*, 44 Id. 546; *Larrabee v. Talbott*, 46 Id. 637; *Natches v. Minor*, 48 Id. 727; *Strawbridge v. Robinson*, 50 Id. 420; *Smith v. Blatchford*, 52 Id. 504; *Cheuning v. Johnson*, Id. 610, and cases cited in the notes thereto. In *Dehon v. Foster*, 4 Allen, 553, the principal case is cited to the point that the law of one country can operate in another only by comity, and can not be allowed to have any effect to the injury of citizens of the state whose laws are invoked to carry it into effect.

DISCHARGE UNDER FOREIGN BANKRUPT LAW, when a bar to an action and when not: See *Van Raugh v. Van Aredaln*, 2 Am. Dec. 259; *Smith v. Smith*,

3 Id. 410; *Baker v. Wheaton*, 4 Id. 71; *White v. Canfield*, 5 Id. 249; *Blanchard v. Russell*, 7 Id. 106, and notes. See generally, as to the effect of a discharge under a state insolvent law upon claims of non-residents, *Tebbetts v. Pickering*, 51 Id. 48, and cases cited in the note thereto. In the case of *In re Kingsley*, 1 Low. 221, it is held, citing the principal case, that a discharge of a debtor under the bankrupt law of the country where a contract was to be performed by such debtor discharges such contract as to all the world. But an assignment by a debtor, under the insolvent law of his own state, can have no validity as against an attachment in another state by one of its citizens seeking to collect a debt payable there: *Pingree v. Hudson River Ins. Co.*, 10 Gray, 170; nor as against any remedy which a citizen of the latter state has with respect to property situated there to collect a debt due there: *Taylor v. Columbian Ins. Co.*, 14 Allen, 355, both citing the principal case. In *Marsh v. Putnam*, 3 Gray, 558, the case is referred to as taking a very different view of the effect of a discharge under a foreign bankrupt law, from the view adopted in *Ogden v. Saunders*, 12 Wheat. 213. In *Thornhill v. Bank of Louisiana*, 1 Woods, 7; S. C., 5 Nat. Bank. Reg. 373; *In re Independent Ins. Co.*, 6 Id. 261, the case is also cited, on the strength of certain observations made *arguendo*, to the point that a state insolvent law must give way to a federal bankrupt law, although, as will be perceived, there was no such question in the case.

BENSON v. MONROE.

[7 CUSHING, 125.]

VOLUNTARY PAYMENT ON UNJUST DEMAND, attempted to be enforced by legal proceedings, can not be recovered back, though made under protest, unless there is fraud on the part of the payee, and he knows the claim to be unjust.

ALIEN PASSENGER TAX PAID UNDER PROTEST UNDER LAW AFTERWARDS DECLARED UNCONSTITUTIONAL, but which had previously been held valid, such payment being made in settlement of a suit to recover penalties for non-payment, in which the plaintiff's vessel has been attached, is not deemed to have been paid under compulsion, and can not be recovered back.

ASSUMPSIT in the common pleas, to recover back a sum of money paid by the plaintiffs, as owners of a certain vessel, to the defendant, as superintendent of alien passengers at Boston, as head-money on her alien passengers, under the statute of 1837. It appeared that the vessel, while on her way from England to New York, was injured, and put into Boston for repairs. On landing her passengers, the defendant demanded payment of head-money, which was refused, on the ground that the vessel, having put into Boston in distress, was exempt under the statute. The overseers of the poor brought suit to recover the penalties prescribed by the statute, and attached the vessel. The plaintiffs subsequently paid the head-money and costs to

the defendant, who agreed, as agent for the overseers, to dismiss the suit and attachment (which was accordingly done), and that suit should be brought to test the validity of the demand. The payment was made under protest, with notice that suit would be brought to recover it back. The statute in question was afterwards declared unconstitutional by the supreme court of the United States. The judge stated this fact to the jury, and that the demand was illegal, but that if the money was paid on condition that the defendant would have the suit dismissed, and if this was done, the plaintiffs could not recover, notwithstanding their protest, unless the defendant had agreed to repay it if found to have been illegally exacted. Verdict for the defendant; exceptions by the plaintiffs.

W. Sohier and J. Lowell, for the plaintiffs.

P. W. Chandler, city solicitor, for the defendant.

By Court, METCALF, J. The court deem this a plain case. It is an established rule of law, that if a party with a full knowledge of the facts voluntarily pays a demand unjustly made on him, and attempted to be enforced by legal proceedings, he can not recover back the money, as paid by compulsion, unless there be fraud in the party enforcing the claim, and a knowledge that the claim is unjust. And the case is not altered by the fact that the party so paying protests that he is not answerable, and gives notice that he shall bring an action to recover the money back. He has an opportunity, in the first instance, to contest the claim at law. He has, or may have, a day in court; he may plead and make proof, that the claim on him is such as he is not bound to pay. This circumstance distinguishes such a case from most of those which were cited for the plaintiffs. As was said by Gibbs, J., in *Brisbane v. Dacres*, 5 Taunt. 152, the party has an option, whether to litigate the question or submit to the demand and pay the money. See also *Preston v. City of Boston*, 12 Pick. 13, 14; *Rawson v. Porter*, 9 Greenl. 119.

In *Brown v. McKinally*, 1 Esp. 279, a party, who was sued for old iron sold and delivered, paid the sum demanded, objecting at the time that the iron was not such as he contracted for, but was of an inferior quality and less value, and giving notice to the vendor that payment was made without prejudice, and that a suit would be brought to recover back the overplus thus paid. On his bringing such suit, Lord Kenyon decided that it could not be maintained, and said that to allow it would be to try every question twice; that the same legal ground which would

entitle the plaintiff to recover in that suit would have been a good defense to the suit brought against him by the defendant; and that the plaintiff should have made his defense to that suit. This decision has been repeatedly recognized and confirmed by the courts in England. Two or three cases only need be cited. In *Hamlet v. Richardson*, 9 Bing. 644, the plaintiff had paid a certain sum of money to the defendant after action brought, with knowledge of the facts on which the demand was founded; and it was held that he could not recover it back. Tindal, C. J., referred to *Brown v. McKinally*, *supra*, and also to *Milnes v. Duncan*, 6 Barn. & Cress. 679, where Holroyd, J., said that money paid after legal proceedings were instituted could not be recovered back, if there was no fraud in the party receiving the money. The same doctrine was fully recognized by the court of king's bench in *Duke de Cadaval v. Collins*, 4 Ad. & El. 858; S. C., 6 Nev. & M. 324. In that case, it was decided that if a party, knowing that he has no cause of action, fraudulently arrests another, who pays money to get rid of the pressure of the arrest, the money so paid may be recovered back; on the ground that legal process was colorably and fraudulently used to enforce a fictitious demand. This principle seems to have been applied in the case of *Richardson v. Duncan*, 3 N. H. 508, cited by the plaintiffs' counsel. But the case at bar does not fall within this principle. Here was no fraud; no attempt to plunder the plaintiffs by color of legal process. They should have contested the demand made on them, in the suit that was instituted against them; and having voluntarily adjusted that demand, and relieved their vessel from seizure, with a full knowledge or means of knowledge of all the facts of their case, they can not now be permitted to disturb that adjustment.

Judgment on the verdict for the defendant.

COMPULSORY PAYMENT, WHAT DEEMED TO BE, so as to enable the payor to recover back the money paid, and what not: See the note to *Mayor of Baltimore v. Lefferman*, 45 Am. Dec. 153, where this subject is discussed at some length. See also *Robinson v. Charleston*, Id. 739; *Baltimore etc. R. R. Co. v. Faunce*, 46 Id. 655; *Boas v. Updegrove*, 47 Id. 425; *Boutelle v. Melendy*, 49 Id. 152; *Alston v. Durant*, Id. 596, and notes thereto. The assertion of an unfounded claim in good faith and the attempt to enforce it by a suit at law do not render a payment made thereunder, by mistake of law but with full knowledge of the facts, compulsory, so as to enable the payor to recover it back: *Livermore v. Peru*, 55 Me. 477; *Cahaba v. Burnett*, 34 Ala. 405; *Ligonier v. Ackerman*, 46 Ind. 565; S. C., 15 Am. Rep. 333; *Harrison v. Milwaukee*, 49 Wis. 252. Much less does the mere prospect of judicial proceedings make a payment under stress thereof compulsory: *Stephan v. Daniels*, 27 Ohio St.

541. And generally, where a payment is made on an unjust demand, with full knowledge of the facts, it is voluntary, and not recoverable, unless there has been fraud or duress: *Ladd v. Southern Cotton Press etc. Co.*, 53 Tex. 192. But where one fraudulently and with knowledge that he has no just claim sues out process and seizes the body or goods of another, and the latter, to obtain a release of his person or property, pays the demand, the payment is compulsory, and recoverable: *Chandler v. Sanger*, 114 Mass. 365. So where one unjustly claims a lien on another's goods for commissions or the like and refuses to deliver them, and the owner, to obtain their release, pays the sum demanded under protest, the payment is compulsory, and he may recover it back: *Briggs v. Boyd*, 56 N. Y. 293. In all these cases *Benson v. Monroe* is recognized as authority.

RECOVERY OF MONEY PAID BY MISTAKE OF LAW OR FACT: See *Northrop v. Graves*, 50 Am. Dec. 264; *Culbreath v. Culbreath*, Id. 375, and cases cited in the notes thereto. That money paid under a mistake of law, but with full knowledge of the facts and without fraud or compulsion, can not be recovered back, is a point to which the principal case is cited in *Brummagin v. Tillinghast*, 18 Cal. 271; *Livermore v. Peru*, 55 Me. 477; *Cook v. Boston*, 9 Allen, 393. So where the money is paid under a law or an assessment which is afterwards declared void: *Carew v. Rutherford*, 106 Mass. 13; *Wilde v. Baker*, 14 Allen, 351. Otherwise where there is fraud or oppression: *Carew v. Rutherford*, *supra*.

MUSSEY v. SCOTT.

[7 CUNNING, 215.]

EXECUTION OF SEALED LEASE BY AUTHORIZED ATTORNEY SIGNING HIS OWN NAME "for" the principal (naming him), and affixing a seal, is valid.

COVENANT in the common pleas for rent upon a lease, purporting in the body of it to be made by the plaintiff to the defendant, but signed thus: "John Hammond for B. B. Mussey." (Seal.) The defendant claimed that the suit should have been in Hammond's name, but the objection was overruled. Verdict for the plaintiff, and exceptions by the defendant.

F. W. Sawyer, for the defendant.

A. H. Fiske, for the plaintiff.

By Court, METCALF, J. The defendant does not deny Hammond's authority, but takes the ground that the lease is not the deed of Mussey, but of Hammond. And the common learning is relied on, to wit, that when a deed is executed by attorney, it must be the act of the principal, done and executed in the principal's name.

The only question is, What is an execution of a deed, by an attorney, in the name of the principal? We understand the execution of a deed to be the signing, sealing, and delivery of

it. These must be done in the name of the principal, by the hand of the attorney. When the signing and sealing are in the name of the principal, the delivery will be presumed to have been so, unless the contrary is proved. But however clearly the body of the deed may show an intent that it shall be the act of the principal, yet unless it is executed by his attorney for him, it is not his deed, but the deed of the attorney, or of no one: *Lessee of Clarke v. Courtney*, 5 Pet. 350.

The most usual and approved form of executing a deed by attorney is by his writing the name of the principal, and adding "by A. B., his attorney," or "by his attorney, A. B." But this is not the only form of execution which will make the deed the act of the principal. In *Wilks v. Back*, 2 East, 142, M. Wilks, attorney of J. Browne, executed a deed for himself and Browne, in this form: "Mathias Wilks." [Seal.] "For James Browne, Mathias Wilks." [Seal.] The court of king's bench decided that the deed was well executed in the name of Browne. This decision has never been overruled, but has always been regarded as rightly made: Sugd. on P., 1st Am. ed., 205; Pal. Ag., 3d Am ed., 182; 3 Am. Jur. 82 et seq.; *Wilburn v. Larkin*, 3 Blackf. 55; *Hunter v. Miller*, 6 B. Mon. 612. We are therefore of opinion that the ruling at the trial was correct.

Exceptions overruled.

AGENT SIGNING DEED "A., AGENT FOR B.," binds his principal, it is held in *Magill v. Hinsdale*, 16 Am. Dec. 70, if it appears from the whole instrument that he intended it as the act of the principal. If the granting part and the covenants are in the principal's name, such a signing is sufficient: *Hale v. Woods*, 34 Id. 176. Otherwise where the granting clause of a deed so signed runs as follows: "I, A. B., attorney in fact of C. D., do grant," etc.: *Welsh v. Usher*, 29 Id. 63. See generally, as to the form of execution of sealed instruments by an agent or attorney in fact in order to bind the principal, the cases in this series cited in the note to *Hale v. Woods*, *supra*. See also *Shanks v. Lancaster*, 50 Id. 108; *Wood v. Goodridge*, 52 Id. 771, and notes. The signing of an instrument not under seal by an agent thus, "A., agent for B.," binds the principal: *Garrison v. Combs*, 22 Id. 120. See also *Long v. Colburn*, 6 Id. 160; *Rice v. Gove*, 33 Id. 724; and *Robertson v. Pope*, 44 Id. 267, substantially to the same effect. And generally, as to the sufficiency of an agent's execution of unsealed instruments to bind his principal, see also *Andrews v. Estes*, 26 Id. 521; *Despatch Line v. Bellamy Mfg. Co.*, 37 Id. 203; *Morse v. Green*, 38 Id. 471; *Merchants' Bank v. Central Bank*, 44 Id. 665; *Clealand v. Walker*, 46 Id. 238, and cases cited in the notes thereto. Where the agent or president of a corporation executes a lease or other deed in his own name "for" the company, it is good: *Northwestern Distilling Co. v. Brant*, 69 Ill. 660, citing the principal case. In *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 105, it is held that where an agent executes an instrument, sealed or unsealed, if he signs it "J. T. for D. P.," or "for D. P., J. T.," it is good, but not so if he signs it "J. T., agent for D. P.," for this may be sim-

ply a description of himself as agent, and does not necessarily imply that he signs "for" his principal, explaining *Ballou v. Talbot*, 8 Am. Dec. 146. It must be confessed that this is a very refined distinction. In *Fullam v. West Brookfield*, 9 Allen, 4, the principal case is also distinguished from the case at bar, where the committee of a town signed a contract with their own names, and added the words "committee for the town," the contract running: "We, the undersigned, a committee, etc., do hereby agree," etc., on the ground that in the principal case the contract purported on its face to be the contract of the principal, while in the case at bar it did not.

ILSLEY v. MERRIAM.

[7 CUSHING, 242.]

EITHER PRINCIPAL OR FACTOR MAY SUE FOR PRICE of goods sold by the latter, though the principal's name was not disclosed.

DISCHARGE UNDER STATE INSOLVENT LAW DOES NOT BAR ACTION BY NON-RESIDENT principal for the price of goods sold by his factor residing within the state to the insolvent, though the bills were made out in the factor's name as vendor, where he informed the debtor that he was selling on commission for a citizen of another state, but did not name him.

ASSUMPSIT in the common pleas, by the plaintiff, a citizen and resident of Maine, for the price of goods sold. The defense was a discharge in insolvency under the Massachusetts statute. It appeared that the goods were in fact sold by one Field, who made out the bills in his own name as vendor, but he testified that he sold on commission for the plaintiff, and that he told the defendant he was selling for a resident of Maine, but did not remember giving his name. The defendant insisted that Field must, for the purposes of this case, be regarded as the real contracting party, and that the discharge being good against him was a bar to this action, but the judge ruled otherwise. Verdict for the plaintiff, and exceptions by the defendant.

G. M. Browne, for the defendant.

L. Mason, for the plaintiff.

By Court, DEWEY, J. It is a well-established principle that if a factor sells the goods of his principal, an action to recover the price thereof may be brought either in the name of the factor or of the principal. Nor does it make any difference that the name of the principal was not disclosed: Story's Ag., sec. 420. The question in this case is, therefore, the mere question as to the defense arising from the discharge obtained by the defendant under the insolvent law of Massachusetts; and the point for inquiry is, whether such discharge can affect the plaintiff under the circumstances of the case.

Treating the case as a contract made directly with the plaintiff, and rejecting from our consideration the fact of the sale being made through an agent in Massachusetts, the case would seem to fall clearly within the cases of *Savoye v. Marsh*, 10 Met. 594 [43 Am. Dec. 451]; and *Fiske v. Foster*, Id. 597; where, upon much consideration, the court came to the opinion that, giving full effect to the decisions of the supreme court of the United States, a discharge under our insolvent laws would not discharge a debt contracted with a citizen of another state.

But it is contended that, in the case of a sale through an agent, and under the circumstances here stated, the rights of the parties, in reference to a discharge under our insolvent laws, are materially different. The position taken by the defendant is, that Field, the agent, having made the contract in his own name, the name of the principal not being disclosed, the defendant is entitled to be placed in the same situation, in all respects, as if Field had been the real party in interest. Is this a correct view of the law on this point? There is no doubt that the principal, who thus assumes a contract made by his agent, must take it subject to all the equities that would avail the defendant if the agent were the plaintiff; or, to state the principle in other language, the principal "must take them with all the attendant burdens, and subject to all the attendant just counter-claims and defenses of the other contracting party:" Story's Ag., sec. 419. But, in the opinion of the court, the right to set up a discharge in insolvency, under the insolvent laws of Massachusetts, as against all suits by citizens of Massachusetts, is not embraced within any equity or just counter-claim, such as is contemplated in the books of authority enunciating this general principle of defense. It is attempted to be applied here, where the only matter on which it rests is a local statute, having no effect except as to citizens of Massachusetts. The fact having been disclosed to the defendant, at the time of the purchase, that the agent was selling on commission for a principal residing in the state of Maine, as must now be taken to have been found by the jury, under the instructions given them, the case is not open to any objections of surprise or deceit, in the manner the agent treated with the vendor, as to the principal.

Without expressing any opinion beyond the present case, we are satisfied that the instructions are not liable to any objection on the part of the defendant.

Exceptions overruled.

PRINCIPAL'S RIGHT TO SUE ON CONTRACT WITH AGENT: See *Pitts v. Mower*, 36 Am. Dec. 727; *Taintor v. Prendergast*, 38 Id. 618; *Bayley v. Onondaga etc. Ins. Co.*, 41 Id. 759; *Gilpin v. Howell*, 45 Id. 720, and notes. The principal case is cited as an authority on this point in *Earle v. De Witt*, 6 Allen, 531. So it is cited in *Barry v. Page*, 10 Gray, 400, to the point that a principal, foreign or domestic, may sue for the price of goods sold by his factor, unless it is made affirmatively to appear that the credit was given exclusively to the agent.

DISCHARGE UNDER STATE INSOLVENT LAW, EFFECT OF, AS TO NON-RESIDENT CREDITORS: See *Tebbetts v. Pickering*, 51 Am. Dec. 48, and citations in the note thereto. It is settled law in Massachusetts that a debt due a creditor residing in another state, with no express stipulation as to the place of payment, is not affected by a discharge under a state insolvent law: *Dismore v. Bradley*, 5 Gray, 487. Generally, a contract with a non-resident is not affected by such a discharge unless the creditor has so assented to or interfered in the proceedings as to have submitted his interests to the action of the insolvent court: *Brighton Market Bank v. Merick*, 11 Mich. 414. Where a note is given within the state, payable at no particular place, and is indorsed, after due but before the commencement of proceedings in insolvency against the maker, a discharge under such proceedings is no bar to an action on the note: *Fessenden v. Willey*, 2 Allen, 69; all citing the principal case. In *Marsh v. Putnam*, 3 Gray, 566, the case is explained as one in which the debt was neither in terms nor by effect of law made payable within the state. It is cited also in *Brighton Market Bank v. Merick*, 11 Mich. 421, to the proposition that a liability to a state insolvent law is not an equity attaching to a contract and passing with it so as to bind persons who are bound by ordinary equities.

MARSH v. BILLINGS.

[7 CUSHING, 322.]

CARRIAGE PROPRIETORS AUTHORIZED TO USE HOTEL NAME AS BADGE ON their carriages and the caps of their drivers, under an agreement with the hotel owner, whereby they have the privilege of carrying passengers to and from the house, have the exclusive right to the use of such name to indicate that they have the patronage of the house in transporting passengers, and may, without proof of special damage, maintain an action against one who uses the same badge, for the purpose of falsely holding himself out as having such patronage, in order to divert custom from the plaintiffs.

DAMAGES FOR DIVERTING PLAINTIFFS' CUSTOM IN SUCH CASE are not to be confined to the loss of such passengers as the plaintiffs can prove have actually been diverted from their carriages, but the jury are to allow such damages as upon the whole evidence they are satisfied that the plaintiffs have suffered in loss of business by such injurious act.

TRESPASS on the case, to recover damages for certain deceitful and wrongful acts of the defendants, hereinafter set forth, whereby the plaintiffs had been greatly injured in their business as carriers of passengers to and from the Revere House. The

plaintiffs had entered into a verbal agreement with Stevens, the lessee of the Revere House, whereby they undertook to keep at the station of the Boston and Worcester Railroad, in Boston, coaches for the transportation, to the Revere House, of passengers arriving at that station who wished to go to that house, and to keep good horses, coaches, and drivers to transport said passengers acceptably; and the said Stevens, in consideration thereof, agreed to employ the plaintiffs to transport passengers from the hotel to the station, and authorized them to use the words "Revere House" as a badge on their carriages and the caps of their drivers. The said Stevens had previously had a similar agreement with the defendants, which had been terminated by mutual consent before the agreement was made with the plaintiffs. The defendants, however, continued to use the words "Revere House" on their coaches and drivers' caps, though requested by Stevens not to do so, and kept their conveyances in attendance at the stations, where their drivers called out the name of the "Revere House" on the arrival of trains. There was evidence also, though this was contradicted, tending to show that on different occasions the defendants' agents represented to passengers that they, and not the plaintiffs, were employed by the Revere House to carry passengers to the house, and thereby induced them to go by their coaches rather than by the plaintiffs', and that in some instances they had thereby persuaded persons to leave the plaintiffs' coaches after entering them, and to go by the defendants' coaches. There was other evidence tending to show the diminution of custom suffered by the plaintiffs in consequence of the defendants' wrongful acts. At the trial at the common pleas the judge instructed the jury that no one could claim the exclusive right of carrying passengers to the Revere House, and that defendants had a lawful right to engage in that business, and to indicate it by suitable badges, and to call out the name of the house, etc., and that the plaintiffs could not recover for these acts alone, but that if the plaintiffs were authorized by Stevens to hold themselves out as his agents for that purpose, and if the defendants, knowing the facts, had, by false representations that they and not the plaintiffs were such agents, actually induced passengers to go by their coaches rather than by the plaintiffs', and had actually diverted custom from them, the plaintiffs could recover the damages sustained by loss of passengers in consequence of false representations. Verdict for the plaintiffs for seventy-five cents, and the plaintiffs excepted to the instructions.

W. Sohier, for the plaintiffs.

W. Brigham, for the defendants.

By Court, FLETCHER, J. This is an action on the case, sounding in tort. The principle involved in the merits of the case is one of much importance, not only to persons situated as the plaintiffs are, but also to the public. But this principle is by no means novel in its character, or in its application to a case like the present. It is substantially the same principle, which has been repeatedly recognized and acted on by courts, in reference to the fraudulent use of trade-marks, and regarded as one of much importance in a mercantile community. Vast numbers, no doubt, of the strangers who are continually arriving at the stations of the various railroads in the city have a knowledge of the reputation and character of the principal hotels, and would at once trust themselves and their luggage to coachmen supposed to have the patronage and confidence of these establishments. Not only much wrong might be done to individuals situated like the plaintiffs, but great fraud and imposition might be practiced upon strangers, if coachmen were permitted to hold themselves out, falsely, as being in the employment or as having the patronage and countenance of the keepers of well-known and respectable public houses. It was said, in behalf of the defendants, that the lessee of the Revere House had no exclusive right to convey passengers from the Worcester railroad to his house, nor had he the exclusive right to put upon his coaches or the badges of his servants the words "Revere House," and could confer no such exclusive right on the plaintiffs; that the defendants, in common with all other citizens, have a right to convey passengers from the Worcester railroad to any public house, and have a right to indicate their intention so to do, by marks on their coaches and on the badges of their servants.

This may all be very true, but it does not reach the merits of the case. The plaintiffs do not claim the exclusive right of using the words "Revere House;" but they do claim the exclusive right to use those words in a manner to indicate, and for the purpose of indicating, the fact that they have the patronage and countenance of the lessee of that house, for the purpose of transporting passengers to and from that house, to and from the railroads. The plaintiffs may well claim that they had the exclusive right to use the words "Revere House," to indicate the fact that they had the patronage of that establishment; because the evidence shows that such was the fact, and that the plaintiffs, and

they alone, had such patronage of that house, by a fair and express agreement with the lessee. For this privilege they paid an equivalent in the obligations into which they entered. The defendants, no doubt, had a perfect right to carry passengers from the station to the Revere House. And they might perhaps use the words "Revere House," provided they did not use them under such circumstances and in such a manner as to effect a fraud upon others.

The defendants have a perfect right to carry on as active and as energetic a competition as they please, in the conveyance of passengers to the Revere House or any other house. The employment is open to them as fully and freely as to the plaintiffs. They may obtain the public patronage by the excellence of their carriages, the civility and attention of their drivers, or by their carefulness and fidelity, or any other lawful means. But they may not by falsehood and fraud violate the rights of others. The business is fully open to them, but they must not dress themselves in colors, and adopt and wear symbols, which belong to others.

The ground of action against the defendants is not that they carried passengers to the Revere House, nor that they had the words "Revere House" on the coaches and on the caps of the drivers, merely; but that they falsely and fraudulently held themselves out as being in the employment, or as having the patronage and confidence, of the lessee of the Revere House, in violation of the rights of the plaintiffs. The jury would have been well warranted by the evidence in finding that the defendants used the words "Revere House," not for the purpose of indicating merely that they carried passengers to that house, but for the purpose of indicating, and in a manner and under circumstances calculated and designed to indicate, that they had, and to hold themselves out as having, the patronage of that establishment. Upon the evidence in the case, the jury should have been instructed, that if they were satisfied by the evidence that the plaintiffs had made the agreement with the lessee of the Revere House, as stated, they had, under and by virtue of that agreement, an exclusive right to use the words "Revere House," for the purpose of indicating and holding themselves out as having the patronage of that establishment for the conveyance of passengers; and that if the defendants used those words, in the manner and under the circumstances stated in the evidence, for the purpose of falsely holding themselves out as having the patronage and confidence of that house, and in that way to in-

duce passengers to go in the defendants' coaches, rather than in those of the plaintiffs, that would be a fraud on the plaintiffs, and a violation of their rights for which this action would lie, without proof of actual or specific damage; that if the jury found for the plaintiffs, they would be entitled to such damages as the jury, upon the whole evidence, should be satisfied they had sustained; that the damage would not be confined to the loss of such passengers as the plaintiffs could prove had actually been diverted from their coaches to those of the defendants; but that the jury would be justified in making such inferences, as to the loss of passengers and injury sustained by the plaintiffs, as they might think were warranted by the whole evidence in the case.

Though the instructions, as given, may have been intended to conform substantially to these views, yet, upon the whole, it seems to the court that the principles of the law, upon which the rights of the parties were to be determined, were not stated with all that distinctness and accuracy which the practical importance of the case requires.

The principles of law which govern this decision are so fully settled by numerous decisions that it seems unnecessary to go into any particular examination of authorities, but it is sufficient merely to refer to some leading cases: *Coats v. Holbrook*, 2 Sandf. Ch. 586; *Blofield v. Payne*, 4 Barn. & Adol. 410; *Morison v. Salmon*, 2 Man. & G. 385; *Knott v. Morgan*, 2 Keen, 213; *Croft v. Day*, 7 Beav. 84; *Rodgers v. Nowill*, 5 Man. G. & S. 109; *Bell v. Locke*, 8 Paige, 75 [34 Am. Dec. 371]; *Stone v. Carlan*, 2 Sandf. 738.

New trial ordered.

RIGHT OF CARRIAGE COMPANY TO PROTECTION IN USE OF HOTEL NAME as badge, under agreement with hotel proprietor: See the note to *Partridge v. Menck*, 47 Am. Dec. 286. The principal case is cited in *Julian v. Hoosier Drilling Co.*, 78 Ind. 416, as an authority upon the subject of property in a trade-mark and the assignment thereof.

DAMAGES FOR DIVERTING CUSTOM from the plaintiff by fraudulent simulation of his label are not confined to the loss of sales actually proved, but the jury may, from the whole evidence, make such inferences as to the loss and injury as they think the case warrants: *Conrad v. Joseph Uhrig Brewing Co.*, 8 Mo. App. 285. So where the injury complained of is the diversion of the plaintiff's trade by engaging in the same business as a rival contrary to an agreement between the parties, the damages are not capable of definite computation, but must be arrived at by a general estimate from the evidence, which is peculiarly within the province of the jury: *Doyle v. Dixon*, 97 Mass. 213, both citing the principal case.

REMEDIES FOR NEW FORMS OF INJURY MUST BE SOUGHT in the existing remedies adopted in analogous cases: *Carew v. Rutherford*, 106 Mass. 11, referring to the principal case as an illustration.

CAMPBELL v. RACE.

[7 Cushing, 408.]

TRAVELER GOING FROM HIGHWAY UPON ADJOINING LAND FROM NECESSITY, because the highway is made temporarily impassable by snow-drifts, is not guilty of trespass if he does no unnecessary damage.

TRESPASS for breaking and entering the plaintiff's close. The defense was, that while the defendant was lawfully passing with his team along the highway he found it obstructed and made impassable at a certain point by snow-drifts, and necessarily turned out of the highway into the plaintiff's field to pass the obstruction, doing no unnecessary damage. The judge of the common pleas ruled that the defense was invalid.

W. Porter and J. C. Wolcott, for the defendant.

I. Sumner, for the plaintiff.

By Court, BIGELOW, J. It is not controverted by the counsel for the plaintiff, that the rule of law is well settled in England that where a highway becomes obstructed and impassable from temporary causes, a traveler has a right to go *extra viam* upon adjoining lands, without being guilty of trespass. The rule is so laid down in the elementary books: 2 Bla. Com. 36; Woolrych on Ways, 50, 51; 3 Cru. Dig. 89; Wellbeloved on Ways, 38; and it is fully supported by the adjudged cases: *Henn's Case*, W. Jones, 296; 3 Salk. 182; *Pomfret v. Ricroft*, 1 Saund. 323, note 3; *Absor v. French*, 2 Show. 28; *Young v. —*, 1 Ld. Raym. 725; *Taylor v. Whitehead*, 2 Doug. 745; *Bullard v. Harrison*, 4 Mau. & Sel. 387, 393. Such being the admitted rule of law, as settled by the English authorities, it was urged in behalf of the plaintiff in the present case that it had never been recognized or sustained by American authors or cases. But we do not find such to be the fact. On the contrary, Mr. Dane, whose great learning and familiar acquaintance with the principles of the common law and their practical application at an early period in this commonwealth entitle his opinion to very great weight, adopts the rule as declared in the leading case of *Taylor v. Whitehead*, *ubi supra*, which he says "is the latest on the point, and settles the law:" 3 Dane's Abr. 258. And so Chancellor Kent states the rule: 3 Kent's Com. 424. We are not aware of any case in which the question has been distinctly raised and adjudicated in this country; but there are several decisions in New York in which the rule has been incidentally recognized and treated as well-settled law: *Holmes v. Seely*, 19

Wend. 507; *Williams v. Safford*, 7 Barb. 309; *Newkirk v. Sabler*, 9 Id. 652. These authorities would seem to be quite sufficient to justify us in the recognition of the rule. But the rule itself is founded on the established principles of the common law and is in accordance with the fixed and uniform usage of the community. Indeed, one of the strongest arguments in support of it is, that it has always been practiced upon and acquiesced in, without objection, throughout the New England states. This accounts satisfactorily for the absence of any adjudication upon the question in our courts, and is a sufficient answer to the objection upon this ground which was urged upon us by the learned counsel for the plaintiff. When a right has been long claimed and exercised, without denial or objection, a strong presumption is raised that the right is well founded.

The plaintiff's counsel is under a misapprehension in supposing that the authorities in support of the rule rest upon any peculiar or exceptional principle of law. They are based upon the familiar and well-settled doctrine, that to justify or excuse an alleged trespass, inevitable necessity or accident must be shown. If a traveler in a highway, by unexpected and unforeseen occurrences, such as a sudden flood, heavy drifts of snow, or the falling of a tree, is shut out from the traveled paths, so that he can not reach his destination, without passing upon adjacent lands, he is certainly under a necessity so to do. It is essential to the act to be done, without which it can not be accomplished. Serious inconveniences, to say the least, would follow, especially in a climate like our own, if this right were denied to those who have occasion to pass over the public ways. Not only would intercourse and business be sometimes suspended, but life itself would be endangered. In hilly and mountainous regions, as well as in exposed places near the sea-coast, severe and unforeseen storms not unfrequently overtake the traveler, and render highways suddenly impassable, so that to advance or retreat by the ordinary path is alike impossible. In such cases, the only escape is by turning out of the usually traveled way, and seeking an outlet over the fields adjoining the highway. If a necessity is not created under such circumstances sufficient to justify or excuse a traveler, it is difficult to imagine a case which would come within the admitted rule of law. To hold a party guilty of a wrongful invasion of another's rights, for passing over land adjacent to the highway, under the pressure of such a necessity, would be pushing individual rights of property to an unreasonable extent, and giving them a pre-

tection beyond that which finds a sanction in the rules of law. Such a temporary and unavoidable use of private property must be regarded as one of those incidental burdens to which all property in a civilized community is subject. In fact, the rule is sometimes justified upon the ground of public convenience and necessity. Highways being established for public service, and for the use and benefit of the whole community, a due regard for the welfare of all requires, that when temporarily obstructed, the right of travel should not be interrupted. In the words of Lord Mansfield: "It is for the general good that people should be entitled to pass in another line." It is a maxim of the common law, that where public convenience and necessity come in conflict with private right, the latter must yield to the former. A person traveling on a highway is in the exercise of a public and not a private right. If he is compelled, by impassable obstructions, to leave the way, and go upon adjoining lands, he is still in the exercise of the same right. The rule does not, therefore, violate the principle that individual convenience must always be held subordinate to private rights, but clearly falls within that maxim which makes public convenience and necessity paramount.

It was urged in argument that the effect of establishing this rule of law would be to appropriate private property to public use without providing any means of compensation to the owner. If such an accidental, occasional, and temporary use of land can be regarded as an appropriation of private property to a public use, entitling the owner to compensation, which may well be doubted, still the decisive answer to this objection is quite obvious. The right to go *extra viam*, in case of temporary and impassable obstructions, being one of the legal incidents or consequences which attaches to a highway through private property, it must be assumed that the right to the use of land adjoining the road was taken into consideration and proper allowance made therefor, when the land was originally appropriated for the highway, and that the damages were then estimated and fixed, for the private injury which might thereby be occasioned.

It was also suggested that the statutes of the commonwealth, imposing the duty on towns to keep public ways in repair, and rendering them liable for damages occasioned by defects therein, furnish ample remedies in cases of obstructions, and do away with the necessity of establishing the rule of the common law in this commonwealth, which gives the right in such cases to pass over adjacent lands. But this is not so. Towns are not liable

for damages in those cases to which this rule of the common law would most frequently be applicable—of obstructions occasioned by sudden and recent causes, which have not existed for the space of twenty-four hours, and of which the towns have had no notice. Besides, the statute liability of towns does not extend to damages such as would ordinarily arise from the total obstruction of a highway; being expressly confined to cases of bodily injuries and damages to property: Stat. 1850, c. 5; *Canning v. Williamstown*, 1 Cush. 451; *Harwood v. Lowell*, 4 Id. 310; *Brailey v. Southborough*, 6 Id. 141.

From what has already been said, the limitations and restrictions of the right to go upon adjacent lands in case of obstructions in the highway can be readily inferred. Having its origin in necessity, it must be limited by that necessity; *cessante ratione, cessat ipsa lex*. Such a right is not to be exercised from convenience merely, nor when, by the exercise of due care, after notice of obstructions, other ways may be selected and the obstructions avoided. But it is to be confined to those cases of inevitable necessity or unavoidable accident arising from sudden and recent causes which have occasioned temporary and impassable obstructions in the highway. What shall constitute such inevitable necessity or unavoidable accident must depend upon the various circumstances attending each particular case. The nature of the obstruction in the road, the length of time during which it has existed, the vicinity or distance of other public ways, the exigencies of the traveler, are some of the many considerations which would enter into the inquiry, and upon which it is the exclusive province of the jury to pass, in order to determine whether any necessity really existed which would justify or excuse the traveler. In the case at bar this question was wholly withdrawn from the consideration of the jury by the ruling of the court. It will therefore be necessary to send the case to a new trial in the court of common pleas.

Exceptions sustained.

RIGHT TO GO UPON ADJOINING LAND WHERE HIGHWAY IS IMPASSABLE. Little, if anything, can be added to what is said upon this subject in the principal case. Mr. Justice Bigelow's opinion collects nearly, if not quite, all the prior adjudications on the question. And the case seems to have settled the law so effectually as to leave no further ground for controversy, and to render any further judicial examination of the question unnecessary. It may, therefore, be laid down as conclusively determined that where a highway becomes obstructed and impassable from temporary causes, a traveler has a right to go *extra viam* upon adjoining land in order to pass the obstruction, and if he does no unnecessary damage he will not be liable in trespass.

therefor: Woolrych on Ways, 50; Angell on Highways, sec. 353; Thompson on Highways, 3; 2 Waterman on Trespass, sec. 703; 2 Bla. Com. 36; 3 Kent's Com. 424; *Henn's Case*, W. Jones, 296; *Absor v. French*, 2 Show. 28; *Taylor v. Whitehead*, 2 Doug. 749, *per* Lord Mansfield; *Bullard v. Harrison*, 4 Mau. & Sel. 393, *per* Lord Ellenborough, C. J.; *Williams v. Safford*, 7 Barb. 311, *per* Willard, J.; *Newkirk v. Sabler*, 9 Id. 655, *per* Parker, J.; *Holmes v. Seely*, 19 Wend. 510, *per* Nelson, C. J.; *Carey v. Rae*, 58 Cal. 163, *per* McKee, J. Thus in *Absor v. French*, 2 Show. 28, in an action of trespass, there was a plea that there was a highway between two certain points, and that the plaintiff stopped the highway so that the defendant could not pass, "and therefore he went over the plaintiff's close, doing as little harm as he could." This plea was held good on demurrer, for, as the court say, "if the way be so foul as is not passable, I may then justify the going over another man's close next adjoining." Upon similar principles it is held, in *Young v. —*, 1 Ld. Raym. 725, that "every man of common right may justify the going of his servants or of his horses upon the banks of navigable rivers, for towing barges, etc., to whomsoever the right of the soil belongs, and if the water of the river impairs and decreases the banks, etc., then they shall have reasonable way for that purpose in the nearest part of the field next adjoining to the river;" and the case was likened to that of a way through "a great open field" becoming "founderous," so that travelers could justify "going over the outlets of the land not inclosed next adjoining."

The reasons for this doctrine are fully and cogently stated in the principal case. The principle rests upon public necessity—the same necessity which justifies the establishment of highways over private lands generally. As is stated by Lord Mansfield, in *Taylor v. Whitehead*, 2 Doug. 749, highways "are for the public service, and if the usual track is impassable, it is for the general good that people should be entitled to pass in another line." Or, as stated by Lord Ellenborough, in *Bullard v. Harrison*, 4 Mau. & Sel. 393, "it is for the public good that a passage should be afforded to the subjects at all times."

If the adjoining land be inclosed, no doubt a traveler, in order to avoid a temporary and impassable obstruction, may make a breach in the fence sufficient for his passage: Thompson on Highways, 3; *Williams v. Safford*, 7 Barb. 309; *Henn's Case*, W. Jones, 296. The latter case is not a direct authority upon this point, but a case in Norfolk was there mentioned by Mr. Attorney which he said was an action of trespass *quare clausum fregit*: "The defendant pleaded that, time out of mind, there was a common footpath through that close, etc. The plaintiff replied that the defendant went in other places out of the way (which was a kind of new assignment). The defendant rejoined that the footpath was *adeo lutoso et funderoso*, in default of the plaintiff, who ought to amend it, that he could not pass along that, and therefore he went as near the path as he could, in good and passable way, and this was resolved a good plea and justification; out of which Mr. Attorney inferred that in case where a man incloseth and doth not make a good way, it is lawful for passengers to make gaps in his hedges to avoid the ill way, so that they do not ride farther into his grounds than is needful for avoiding the bad way." It was a settled principle of the common law that where a land owner inclosed his lands on both sides of a highway, he thereby assumed the duty of keeping the way good and passable, because by such inclosure he prevented the king's subjects from going upon the roadside when the way was founderous. Hence, if he neglected to repair, and the way became impassable, it was lawful for travelers to go through his inclosure: *Duncombe's Case*, 1 Roll. Abr. 396; Angell on Highways, sec. 254.

This right of going *extra viam* upon private lands where a highway becomes impassable is limited by the necessity to which it owes its origin. It can not be exercised for convenience merely, nor perhaps where there is sufficient notice of the obstruction to enable the party to go by a different road; but it is to be confined, as stated by Bigelow, J., *supra*, to cases of inevitable necessity arising from temporary obstructions originating from sudden and recent causes: 2 Waterman on Trespass, sec. 704; Angell on Highways, sec. 355. And the right, like the cause from which it springs, is temporary only. The impassability of a highway can give no easement, in the nature of a "way by necessity," over another's land: *Carey v. Rae*, 58 Cal. 159.

RIGHT TO GO EXTRA VIAM OVER ANOTHER'S LAND WHERE PRIVATE WAY IS IMPASSABLE.—It is said in Comyns's Digest, tit. Chemin, D, 6, that if a private way be impassable "a passenger may break the fence and go *extra viam* as much as is necessary to avoid the bad way." Blackstone also says that "by the law of the twelve tables at Rome where a man had the right of way over another's land and the road was out of repair, he who had the right of way might go over any part of the land he pleased, which was the established rule in public as well as private ways." "And," says he, "the law of England in both cases seems to correspond with the Roman:" 2 Bla. Com. 36. The only authority cited by Comyns is *Henn's Case*, W. Jones, 296. Blackstone cites the same case, and also *Young v. —*, 1 Ld. Raym. 725; *Absor v. French*, 2 Show. 28; *Horn v. Widlake*, 1 Brownl. 212. None of which were cases of private ways strictly speaking. The cases of *Absor v. French*, *Young v. —*, and *Henn's Case* have already been sufficiently referred to. The case of *Horn v. Widlake*, 1 Brownl. 212, was an action of trespass, and the plea was, in substance, that there had been, from time immemorial, a common footway for all persons through the plaintiff's close, that the plaintiff had stopped up said way and assigned a new way which had since been used by all persons, and that the defendant had passed over said new way, which was the trespass complained of. This plea was adjudged good on demurrer. It will be seen that none of these cases support the doctrine that one having a private way over another's land can go outside the way upon adjoining land when the way becomes impassable. On the contrary, it is well established that one having such a right of way can not, as a general rule, depart from it and go upon adjoining land if the way becomes foundurous or impassable: 2 Waterman on Trespass, sec. 705; Woolrych on Ways, 50; Gale on Easements, 4th ed., 491; *Pomfret v. Ricroft*, 1 Saund. 322 a, note 3; *Taylor v. Whitehead*, 2 Doug. 749; *Bullard v. Harrison*, 4 Mau. & Sel. 393; *Williams v. Safford*, 7 Barb. 309; *Newkirk v. Sabler*, 9 Id. 655; *Holmes v. Seely*, 19 Wend. 507. Speaking of such a way, Lord Ellenborough, C. J., in *Bullard v. Harrison*, *supra*, says: "It is a thing founded in grant, and the grantor of a private way does not grant a liberty to break out of it at random over the whole surface of his close. It is established law that the grantee of a private way can not break out of it." It is the duty of one having such a right of way to keep the way in repair, unless that duty is, by express stipulation or by prescription, imposed on the owner of the land: *Pomfret v. Ricroft*, 1 Saund. 322 a, note 3; *Williams v. Safford*, 7 Barb. 311; *McMillan v. Cronin*, 75 N. Y. 477; S. C., 57 How. Pr. 55; Gale on Easements, 4th ed., 491. This is in accordance with the general rule that where one has an easement in another's land it is his duty, and not that of the land owner, to protect such easement and make necessary repairs: *Prescott v. White*, 32 Am. Dec. 266; *Prescott v. Williams*, 39 Id. 688; *Bartlett v. Peaslee*, 51 Id. 242. Hence as it is the fault of the owner of the way if it should be at any time

impassable, he ought not to be permitted to go upon any other part of the land by reason of such defect. If the owner of land over which there is a private way himself obstruct the way and render it impassable, it is held in several cases that the party having the right of way may rightfully go over another part of the land: *Farnum v. Platt*, 8 Pick. 339; *Leonard v. Leonard*, 2 Allen, 543. But this is denied in *Williams v. Safford*, 7 Barb. 309.

It is intimated by Mr. Justice Buller, in *Taylor v. Whitehead*, 2 Doug. 749, that in case of a "way by necessity," and not by express grant, the same rule does not hold as in case of ways of the latter kind, and that if such a way be temporarily and accidentally impassable, one who has the way may perhaps pass over the adjoining land without being guilty of a trespass. The same doctrine is referred to as being in accordance with the better opinion in 2 Waterman on Trespass, sec. 705. See also Woolrych on Ways, 50. But Lord Ellenborough, C. J., in *Bullard v. Harrison*, 4 Mau. & Sel. 393, seems to put ways by necessity upon the same footing as other private ways in this respect; and in *Williams v. Safford*, 7 Barb. 309, it is expressly adjudged to be the law that with respect to the right to go *extra viam* where the way becomes temporarily impassable, there is no distinction between a private way by grant and a private way *ex necessitate*.

BARNES v. HARRIS.

[7 CUSHING, 576.]

COMMUNICATIONS TO STUDENT OF LAW in an attorney's office by one seeking advice are not privileged, though made under the impression that the student was an attorney.

ASSUMPSIT. Verdict for the plaintiff. The defendant excepted to an alleged error of the court below in rejecting the testimony of a witness who was a law-student in the office of one Whitney, an attorney, respecting certain communications made to such student by the plaintiff who called at the office for professional advice and consulted the witness concerning his case in the attorney's absence. Whitney was not and never had been the plaintiff's attorney. The witness did not know whether or not the plaintiff thought he was Whitney.

F. H. Dewey, for the defendant.

N. Wood, for the plaintiff.

By Court, METCALF, J. The testimony of the witness was excluded, probably either on the ground that he was a student in an attorney's office, and therefore the communication made to him by the plaintiff was privileged, as if made to the attorney himself, or on the ground that the plaintiff supposed that the witness was an attorney at law. But, in our judgment, the testimony ought not to have been excluded on any ground.

It is to be remembered, whenever a question of this kind

arises, that communications to attorneys and counsel are not protected from disclosure in court for the reason that they are made confidentially; for no such protection is given to confidential communications made to members of other professions. The principle of the rule, which applies to attorneys and counsel, says the chief justice in *Halton v. Robinson*, 14 Pick. 422 [25 Am. Dec. 415], is, "that so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country and maintaining them most safely in courts, without publishing those facts which they have a right to keep secret, but which must be disclosed to a legal adviser and advocate to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney shall be forever sealed." And Lord Brougham says, in *Greenough v. Gaskell*, 1 Myl. & K. 103, the rule is established "out of regard to the interests of justice, which can not be upholden, and to the administration of justice, which can not go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations, which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources." See also *Russell v. Jackson*, 9 Hare, 387; 1 Macnally on Ev. 239, 240; Glassford on Ev. 482, 483; *Parker v. Carter*, 4 Munf. 287 [6 Am. Dec. 513].

Such being the reason of the rule which protects communications made to attorneys and counsel, the court should apply the rule to those cases only which fall within that reason. And it is truly said, in *Harr. on Ev.* 36, that as the rule operates to the exclusion of evidence, the courts have always felt inclined to construe it strictly and narrow its effect. We believe the rule is correctly stated in *Foster v. Hall*, 12 Pick. 93 [22 Am. Dec. 400]; viz., that it "is confined strictly to communications to members of the legal profession, as barristers and counselors, attorneys and solicitors, and those whose intervention is necessary to secure and facilitate the communication between attorney and client; as interpreters, agents, and attorneys' clerks." See also 1 Phill. Ev., Am. ed. of 1849, 163; 1 Greenl. Ev., sec. 239.

The witness in this case was not of the legal profession; and

though he was a student in an attorney's office, yet it does not appear that he was either the attorney's agent or clerk for any purpose. Many students at law are never either the one or the other. Some of the members of this court never were.

If the plaintiff's communication was made to the witness in his capacity as a student in Mr. Whitney's office, it is not privileged: *Andrews v. Solomon*, Pet. C. C. 356; nor if it was made on the supposition that the witness was Mr. Whitney or some other attorney at law: *Fountain v. Young*, 6 Esp. 113; 2 Stark. Ev., 4th Am. ed., 396; 1 Greenl. Ev., sec. 241.

New trial ordered.

PRIVILEGED COMMUNICATIONS BETWEEN ATTORNEY AND CLIENT: See *Crisler v. Garland*, 49 Am. Dec. 49; *Bank of Utica v. Mersereau*, Id. 189, and other cases in this series collected in the notes thereto. This privilege extends only to communications made to members of the legal profession, and to interpreters between them and their clients, and perhaps to the clerks of counsel: *Jackson v. French*, 20 Am. Dec. 699; *Foster v. Hall*, 22 Id. 400. So held, also citing the principal case, in *Goddard v. Gardner*, 28 Conn. 175; *Hoy v. Morris*, 13 Gray, 521. The fact that the person making the communication thinks the person he is consulting is of the profession of the law is not enough: *Foster v. Hall*, *supra*. And third persons, present or within hearing when the communications are made, are not privileged from disclosing them: *Jackson v. French*, *supra*; *Hoy v. Morris*, *supra*, citing *Barnes v. Harris*.

THAT STUDENT OR CLERK OF ATTORNEY does not stand in the same relations to the clients of such attorney as the attorney himself, and therefore may, if otherwise authorized by reason of his holding the office of justice of the peace, or the like, take an affidavit for a client of the attorney, is a point to which the principal case is cited in *Knight v. Sampson*. 98 Mass. 38.

MARCY v. STONE.

[8 CUSHING, 4.]

SALE AND CONVEYANCE OF REALTY CAN BE PROVED ONLY BY DEED.

TITLE UNDER LOST DEED CAN BE PROVED ONLY BY POSSESSION, adverse, exclusive, uninterrupted, and continued for not less than twenty years. POSSESSION BY TENANT IN COMMON IS NOT DEEMED ADVERSE to his cotenant.

POSSESSION IS NOT ADVERSE AGAINST OWNER OCCUPYING PART of the premises.

ACTS AND DECLARATIONS OF GRANTEE IN ALLEGED LOST DEED tending to show that no such deed was ever given are admissible to rebut parol evidence raising a presumption of such a deed.

DECLARATIONS OF DECEASED OCCUPANT OF LAND, THAT HE OCCUPIED IT AS TENANT of another, are competent evidence, as part of the *res gesta*, to prove the latter's possession.

WITNESS'S UNDERSTANDING AS TO WHAT LAND CONVERSATION REFERRED TO where he testifies to hearing the plaintiff say that he had received pay "for the land," the question not being limited to his understanding from the conversation itself, the whole of which is given, is inadmissible.

WILL IS NOT COMPETENT EVIDENCE OF TESTATOR'S TITLE to land devised thereby, it seems, in favor of one claiming under it, without other proof of title.

WHERE WILL IS ADMITTED AS ASSERTION OF TITLE BY TESTATRIX to land devised thereby to certain grandchildren, in an action against one claiming through the devisees under an alleged adverse possession begun by the testatrix, her subsequent declarations that she did not own the land and would not buy it except under a certain arrangement, but intended to alter her will, and that if the devisees got the land without such arrangement they would get more than her other grandchildren, are admissible in rebuttal, together with evidence of the number of grandchildren, and of the decree of distribution under the will showing the amount of their shares.

TRESPASS *quare clausum fregit*. The plaintiff claimed under a devise from his father, Jedediah Marcy, of the residue of his estate to his children after a devise of the use of an undivided third part to his wife, Abigail Marcy, afterwards Mrs. Healy, the mother of the plaintiff, all the other devisees having conveyed to him. The defendant claimed under the children of Joseph Marcy, one of the children of Jedediah and Abigail Marcy, on the ground that the plaintiff had sold to his mother prior to 1826, and that she had occupied the same until her death, by her tenant Joseph Marcy, and had devised the land to the children of the said Joseph. Certain testimony offered by the defendant, the purport of which is sufficiently stated in the opinion, was admitted against the plaintiff's objection. The defendant having also introduced in evidence the will of Mrs. Healy devising the land to the children of Joseph Marcy, the plaintiff introduced certain declarations by the testatrix, after the making of the will, to the effect that she did not own the land, had never received a deed from the plaintiff therefor, and would not buy the same unless Joseph and his wife would make a certain settlement of the wife's dower, because if Joseph's children got the land they would receive far more than her other grandchildren. The plaintiff then introduced evidence of a subsequent statement by the testatrix, that the arrangement referred to had not been made, and that she intended to alter her will. The plaintiff further proved the number of Mrs. Healy's grandchildren, and offered in evidence the decree of distribution of her estate to show the shares received by her grandchildren, but this evidence was rejected. Certain acts of occupation of the

premises by the plaintiff during the alleged adverse possession by his mother were proved on the part of the plaintiff. Verdict for the defendant. Exceptions by the plaintiff to the rulings of the court on the admission and rejection of evidence above mentioned.

E. Washburn, for the plaintiff.

R. Newton and J. Mason, for the defendant.

By Court, SHAW, C. J. The bill of exceptions in this case is unsatisfactory, because it leaves in doubt several facts which seem material to the case. We understand that the premises on which the trespass is assigned were about an acre of land, part of a larger estate, formerly belonging to Jedediah Marcy, deceased; and that Jedediah, the elder, devised one undivided third of the estate to Abigail, his wife, and the residue to his children. The one third to the wife is not stated, in terms, to be for life; but it is said "the use of an undivided third part," and no words of limitation; and therefore we assume that the one third to Abigail was for her life. It is stated that the plaintiff proved title in himself by deeds from all the other heirs and devisees, except Abigail, the widow, to all the devised estate except a small parcel not claimed by the defendant and not now in controversy. He then obtained title to the estate in controversy, as part of the whole, subject to the estate of his mother, whether for life or in fee. It does not appear that any partition was ever made.

Of course Jedediah, the plaintiff, was tenant in common with his mother of the entire estate, including the acre in question, during her life, whether she was devisee for life or in fee.

The bill of exceptions then states that the defense opened was, that the plaintiff sold the premises to his mother previous to 1826, and that she occupied the same till her decease. The sale being of an interest in real estate, by a settled rule of law no such sale and conveyance could be proved but by deed. It does not appear that the defendant professed to rely on a deed lost by time and accident; but it may be inferred, from the tenor of the evidence which was offered and relied on, that such was the nature of the defense. Such a lost deed can be proved only by a possession, adverse, exclusive, uninterrupted, and continued such a length of time as to warrant a presumption that there must have been a conveyance, which time is now understood to be not less than twenty years, against a party not under a disability. If such is a true view of the facts, it seems difficult to

perceive what foundation the defendant laid for proof of a lost deed. If Mrs. Marcy, the widow, afterwards Mrs. Healy, was tenant in common with the plaintiff, as she was if there had been no partition, then her holding was consistent with her title, and her possession was not adverse. If, as there was evidence tending to prove, the plaintiff occupied part of the premises in 1830 and 1831, then that possession of the widow was not exclusive. If it became exclusive in 1830 or 1831, and terminated in 1848, it did not continue twenty years. But whatever the evidence was tending to establish the presumption of a lost deed, it was parol evidence; and then her acts and declarations tending to show that no such deed was ever given were evidence tending to rebut the presumption, and therefore competent.

We are then to come to the particular exceptions stated in the bill. According to the view which the court take of the uncontested facts, the points on which the exceptions turn would not seem to be material; but from the manner in which the cause went to the jury, they may have been, and probably were, quite material, and had a controlling influence in producing the verdict.

The first arises upon the testimony of Ammidown. The object was to show that the mother had built a house on this part of the estate, and was in possession of it, by the occupation of the same by her son Joseph and his family, with her permission. The fact that she built a house upon it, under the circumstances, does not go far to prove that she owned or believed she owned the estate in fee; because her husband's children and grandchildren, entitled to the estate in remainder, expectant on the termination of her life-estate, were her own heirs at law; and any improvements made in the estate, at her expense, would inure to their benefit, as if she had given them so much by will. But the particular exception to Ammidown's testimony was this: He was asked what he had heard Joseph say upon the land, as to how he occupied. This was objected to as hearsay. We are of opinion, that this question was admissible as *res gestæ*. It is true that this was a declaration only, and consisted in words; but they were words qualifying his acts of possession and in disparagement of his own title, so far as that circumstance is of importance: *Peaceable v. Watson*, 4 Taunt. 16; and they tended to show that his occupation was not in his own right, but in right of his mother: 1 Greenl. Ev., sec. 109. This testimony falls under the remark already made, that the evidence would

seem immaterial, because it could only tend to prove the mother's possession. If that possession was not adverse, it did little to advance the defense.

2. The next exception arises from a question and answer in the deposition of Eliza Lyon. She was asked—after a statement of a conversation, in which the plaintiff was asked if he had not received pay for the land, and he said he had—what land she understood the conversation to refer to, and this was objected to, but admitted. From the form in which this question was put and allowed, after exception, and with her other testimony, the court are of opinion that it was not admissible. It was not limited to what the witness understood, from the conversation itself, all of which she stated; and for ought that appears, it was simply her own supposition, belief, or understanding, formed, indeed, at the time of the conversation, perhaps from other sources, but from no other part of the conversation than that stated, which has no such reference.

3. It is further stated that the defendant gave in evidence the will of Mrs. Healy, formerly Mrs. Marcy, the widow of Jedediah, by which, as we infer, for it is not stated, she devised this estate in fee to her grandchildren, the children of Joseph, under whom the defendant claims. It does not appear whether she was a widow, or if so, widow a second time when this will was made. Taken in connection with proof of title in her from other sources, this will might have been competent evidence, to prove the chain of title, under which the defendant claims. But as evidence of title to any estate of inheritance in her, it seems difficult to perceive how it could be applied.

But it does not appear for what purpose it was admitted, or whether it was specifically objected to, or admitted with any limitation as to its application. Without deciding whether it was competent, for any purpose, we are of opinion, that if it was admitted as a declaration of hers, in assertion of some title in fee which she could devise, it should have been taken with all her declarations of her intent to alter her will, and her reasons for it, and this would have made the evidence offered by the plaintiff, respecting the number of her children and grandchildren, relevant and competent. We are of opinion, therefore, that the rejection of this evidence, in the posture of the cause, and under the circumstances of the case, was incorrect.

The bill of exceptions is the less satisfactory, and perhaps less intelligible, because no statement is made of the view of the law, as taken by the court, and the instructions given to the jury.

As they were not excepted to, we are of course to presume that they were correct; but it renders it more difficult to ascertain the precise grounds on which evidence was admitted and rejected.

As the report stands, we think two of the exceptions were well taken, and therefore that the verdict must be set aside, and a new trial ordered.

New trial in this court.

PRESUMPTION OF LOST DEED FROM LONG-CONTINUED POSSESSION: See *Wade's Heirs v. Greenwood*, 40 Am. Dec. 759. See generally, as to presumption of a grant from adverse possession, *Casey's Lessee v. Inloes*, 39 Id. 658, and cases cited in the note thereto.

POSSESSION BY TENANT IN COMMON DEEMED ADVERSE to co-tenants, when and when not: See *Phillips v. Gregg*, 36 Am. Dec. 158; *Hart v. Gregg*, Id. 166; *Watson v. Gregg*, Id. 176; *Graffins v. Tottenham*, 37 Id. 472; *Robertson v. Robertson*, 38 Id. 148; *Colburn v. Mason*, 43 Id. 292; *Den ex dem. Meredith v. Andres*, 45 Id. 504; *Thompson v. Mawhinney*, 52 Id. 176, and cases cited in the notes thereto.

OWNER'S POSSESSION OF PART, EFFECT OF, AS AGAINST ADVERSE POSSESSOR: See *Casey's Lessee v. Inloes*, 39 Am. Dec. 658, and note.

DECLARATIONS OF PARTY IN POSSESSION OF LAND as to the right in which he holds are admissible as part of the *res gestæ*: See *Beecher v. Parmele*, 31 Am. Dec. 633; *Abney v. Kingsland*, 44 Id. 491; *Darling v. Bryant*, 52 Id. 162; *Thompson v. Mawhinney*, Id. 176, and notes. So of declarations made in the presence of such occupant and assented to by him: *White v. Morton*, Id. 75. That the declarations of a deceased occupant of land that he held as tenant of another are competent evidence in favor of the latter against a third person, is a point to which the principal case is cited in *Currier v. Gale*, 14 Gray, 505; but it is held in that case that such declarations are not competent evidence before the death of the occupant. In *Ware v. Brookhouse*, 7 Id. 454, it is held that declarations of a deceased owner of land while on the land, in his own favor, are not competent evidence for one claiming under him to prove a right of way over adjoining land, and the principal case is distinguished as being one in which the declarations admitted were against the interest of the person making them, because they qualified his possession and were in disparagement of his title. The case is cited also in *Plimpton v. Chamberlain*, 4 Id. 321, to the point that the declarations of a deceased owner of land are competent evidence against his heir. See generally, as to the admissibility of declarations of a former owner of land as evidence for or against one claiming under him, *Worrall v. Parmelee*, 49 Am. Dec. 350; *Masters v. Varner's Ex'rs*, 50 Id. 114; *Maxwell v. Harrison*, 52 Id. 385; *Settle v. Alison*, Id. 393, and cases referred to in the notes to those decisions.

WITNESS'S UNDERSTANDING AS TO MEANING OF CONVERSATION to which he has testified is not competent evidence: *Hibbard v. Russell*, 41 Am. Dec. 733. So in an action for slander, a witness having testified to the words spoken, can not state what meaning he understood the defendant to intend to convey thereby: *Snell v. Snow*, 46 Id. 730. See generally, as to the admissibility of a witness's understanding of a libelous publication or of slanderous words, *Miller v. Butler*, 52 Id. 768, and cases cited in the note thereto.

JONES MANUFACTURING Co. v. MANUFACTURERS' MUTUAL FIRE INSURANCE Co.

[8 CUSHING, 82.]

STATEMENT IN APPLICATION FOR INSURANCE THAT CASK OF WATER IS KEPT in the third story of the building insured is prospective and in the nature of a representation and not a warranty, under a policy providing that if the "representations" in the application "do not contain a just, full, and true exposition of all the facts," etc., and "are material," the policy shall be void.

FALSITY OF REPRESENTATION IN APPLICATION FOR POLICY IS MATTER OF DEFENSE, and the burden of proof is on the insurers where the application represents that a cask of water is kept in the insured building and the insurers seek to avoid the policy because this representation is untrue.

REFUSAL TO INSTRUCT AS TO EFFECT OF PART OF ALTERATION OF INSURED PREMISES, where an instruction is given as to the effect of the entire alteration, which consists of but a single change, is not error; as where the alteration consisted in changing the position of a stove and stove-pipe, and the court refused to instruct the jury, as requested, that if the change of the stove-pipe materially increased the risk, the policy was void, but did instruct them that such would be the effect if the alteration of the stove and pipe materially increased the risk.

ASSUMPT on a policy of insurance on a certain building. The policy provided that "if the representations" in the application "do not contain a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property insured," so far as known, "and are material to the risk; or if the situation and circumstances affecting the risk thereupon shall be so altered," with the consent of the assured, "as to increase the risk thereupon without the consent of the company," the policy should be void. It was stated in the application, in answer to interrogatories, in substance, that a cask of water and buckets were kept in each story of the building; that there was a stove in the second story set on brick in a frame, and also a stove in the first story set on brick in a frame, with an iron fender around it, and that the stove-pipes were riveted, and did not pass through any partition. The defendants claimed that the assured did not keep a cask of water and buckets in each story, and also that the situation of the stove and stove-pipe in the first story had been changed without their consent. Other facts, and the instructions of the court, appear from the opinion.

G. F. Farley and E. Washburn, for the defendants.

B. F. Thomas, for the plaintiffs.

By Court, SHAW, C. J. The statement in the application that a cask of water was kept in the third story was prospective and in the nature of a representation: *Houghton v. Manufacturers' Mutual Fire Ins. Co.*, 8 Met. 114 [41 Am. Dec. 489]. The judge ruled that if this statement was untrue, it was matter of defense, and that the burden of proof was on the defendants, if they relied on this as a defense to avoid the policy, to prove that a cask was not placed in the third story. We think this ruling was correct and conformable to the rule of law: *Callin v. Springfield Fire Ins. Co.*, 1 Sumn. 434. The other ground of defense was, that by changing a stove-pipe the assured had increased the risk without the consent of the company. The evidence tended to show that the position of the stove in the lower story was changed, and that the smoke-pipe, instead of passing into the chimney in that story as it had before, was carried up through the floors of the second and third stories, and after passing round the third story, about two feet from the floor, for the purpose of drying wool, was made to enter the chimney in that story. The defendants contended and requested the judge to instruct the jury that if the change of the stove-pipe and the use of it in the third story materially increased the risk of fire in that story, the policy would be avoided if this was done without the consent of the company. The judge, without giving the particular instruction as to this detached fractional part of the entire alteration, as requested by the defendants, instructed the jury generally that if the alteration made by the plaintiff of the stove and smoke-pipe increased the risk or hazard from fire, it would avoid the policy and the plaintiff could not recover. This instruction was sufficiently favorable to the defendants. The alteration consisted in one single change; it was a question of fact whether that one change did increase the risk. Had there been several changes in the insured premises, detached in time and place, and having no connection with each other, some of which would increase, and others diminish the risk, it would have presented a different question, on which we give no opinion.

Judgment for the plaintiffs.

WARRANTIES AND REPRESENTATIONS IN INSURANCE CONTRACTS: See *Glen-dale Woolen Co. v. Protection Ins. Co.*, ante, 309, and cases cited in the note thereto. The principal case is cited in *Campbell v. New England etc. Ins. Co.*, 98 Mass. 391, to the point that where statements in an application for

insurance are referred to in the policy as "statements" or "representations," or where from the form in which they are expressed there appears to have been no intention to give them the force of warranties, they will not be so construed.

ALTERATIONS OF INSURED PREMISES AS AFFECTING RISK: See *Houghton v. Manufacturers' etc. Ins. Co.*, 41 Am. Dec. 489, and citations in the note thereto.

ONUS IS ON INSURERS TO PROVE FALSITY OF REPRESENTATION by an applicant for insurance to defeat the policy: *Campbell v. New England etc. Ins. Co.*, 98 Mass. 394, citing the principal case.

RITGER v. PARKER.

[8 CUSHING, 145.]

EASEMENT OR SERVITUDE IS RIGHT OF ONE PROPRIETOR TO SOME PROFIT, benefit, or beneficial use in the land of another.

OWNER OF LAND CAN NOT HAVE EASEMENT IN HIS OWN ESTATE in fee.

TO EXTINGUISH EASEMENT BY UNITY OF TITLE and possession of the dominant and servient tenements in the same person, such person must have an estate in fee in both tenements.

RIGHT OF WAY APPURTENANT IS NOT EXTINGUISHED BY MERGER IN MORTGAGE taking possession of the dominant and servient estates under separate mortgages for the purpose of foreclosure, but conveying one of the estates before foreclosure.

REDEMPTION BY MORTGAGOR OR FORECLOSURE OF MORTGAGE RESTORES OR PASSES ESTATE WITH ALL EASEMENTS, servitudes, and other incidents appertaining to it before the mortgage. *Per Shaw, C. J.*

TRESPASS *quare clausum fregit* in the common pleas. The defendant justified under an alleged right of way appurtenant to his land over the *locus in quo*. The plaintiff claimed that the alleged right of way had been extinguished. It appeared that the defendant's land was conveyed to one James Gardner, in 1836, and was by him in the same year mortgaged to Margaret Gardner. The plaintiff's land was conveyed to James Gardner, December 10, 1839, and was mortgaged on the next day to Margaret Gardner. Margaret Gardner took possession of both tracts to foreclose, on April 5, 1841, but conveyed the defendant's tract, September 26, 1842, to Gilbert Parker. Both mortgages were foreclosed April 23, 1844, after which Margaret Gardner conveyed to the plaintiff, and Gilbert Parker to the defendant. The judge held the right of way extinguished. Verdict for the plaintiff; exceptions by the defendant.

J. G. Abbott, for the defendant.

J. P. Converse, for the plaintiff.

By Court, SHAW, C. J. To an action of trespass *quare clausum*, the defendant sets up a right of way to pass on and

over the close of the plaintiff; and insists, that as he entered in the exercise of that right, such entry was no trespass.

It appears from the report that the plaintiff and the defendant own estates adjoining each other, and the defendant, as such owner, claims a right of way, as annexed to his estate. The plaintiff insists that even though such right did formerly exist by grant or prescription, for the owner of the estate now owned by the defendant, in and over the estate now owned by the plaintiff, such easement has been extinguished, by unity of title and possession of the two estates, in one and the same person at the same time. To determine this, it is necessary to examine the facts furnished by the report.

It appears that prior to 1839 these estates were held by different owners, so that an easement might be had by the owner of one, as incident to his estate, in and over the other; and if there has been any unity of title and possession, in any one person, of the dominant and servient tenements, so as to extinguish the easement, it must have been effected by subsequent conveyances.

From the facts stated in the bill of exceptions, it is manifest that James Gardner was never seised in fee in full right of both estates at any one time. He held the defendant's estate from June, 1836, to the twenty-fourth of September, 1836, and then mortgaged it. In like manner he held the plaintiff's estate one day only, from the tenth to the eleventh of December, 1839, and this he acquired long after he had mortgaged the estate formerly held.

So Margaret Gardner was never seised in fee of an indefeasible estate, in both estates, at any one time. She held both estates, as mortgagee, from the eleventh of December, 1839, when she took the second mortgage of James Gardner, on the plaintiff's tenement, until the twenty-fifth of September, 1842, when she, as mortgagee, and before the foreclosure of the mortgages, conveyed the defendant's tenement to Gilbert Parker. She held both estates as mortgagee at the same time almost three years, but they were both defeasible estates, each on payment of a certain sum of money.

Was there, then, at any time such a unity of title and possession, at one and the same time, in both these tenements, as to merge and extinguish an easement which one had over the other, either by grant or prescription? The precise ground on which such extinguishment is held to take place is well expressed in Woolrych on Rights of Common, 148: "To per-

petuate the extinguishment incident to unity of possession, the estates thus united must be respectively equal in duration, and not liable to be again disjoined by the act of the law."

But upon principle it seems to us, that in order to extinguish an easement, by the unity of title and possession, both of the dominant and servient tenements, in the same person, he should have a permanent and enduring estate, an estate in fee in both. This results from the consideration of a few obvious principles. An easement or servitude is a right which one proprietor has to some profit, benefit, or beneficial use, out of, in, or over the estate of another proprietor. An owner of land, therefore, can not have an easement in his own estate in fee, for the plain and obvious reason that in having the *jus disponendi*—the full and unlimited right and power to make any and every possible use of the land—all subordinate and inferior derivative rights are necessarily merged and lost in the higher right. He may use every part of the surface for a way if he chooses, and therefore has no occasion to claim any particular way; and so of every other use to which land may be subjected. If, therefore, after such merger, the owner grants away a portion of his estate, it is the creation of a new estate, and not the revival of an old one. And although he may make a grant of that particular land, which formerly constituted one of the separate estates, which coalesced in him, yet it is not with its former incidents, unless it is done by force of the grant itself, by such words of description as could bring them into being, by way of new grant. He may grant one of the estates, with such rights of way and other easements over his own land retained as he may think fit, without reference to the former ways, in the same or in any other direction; so he may reserve out of the estate granted, and annex to his other estate retained, any rights of way or other easements which may best suit his views of his own interest or benefit. Such easements, by such acts of creation and annexation, would become incident and appurtenant to such estates respectively, and would pass, as appurtenant, in after conveyances, by or even without the word "appurtenances," so long as such estates should subsist, as distinct estates in different proprietors; but they would have their source and origin in such grants and reservations, made by one having the full disposing power, and not in the supposed or actual anterior existence of similar or even of the same ways or other incidents. This, of course, does not extend to watercourses and such natural incidents as belong to the land itself, and are inseparable from it.

From this view of the subject, it seems manifest that the merger of the easement, arising from unity of title and possession, which will extinguish and put an end to such easement, arises from that unlimited power of disposal, which will enable the owner to grant any part of the soil with the former incidents, or to grant it without the former incidents, or create and annex to it or subject it to new incidents in favor of another estate, at his own will and pleasure. Such a power of disposal can only exist when the same proprietor has a permanent estate in both tenements, not liable to be defeated by the performance of a condition or happening of any event beyond his control, and where the estates can not again be disjoined by operation of law.

Tested by these rules, it appears to us that there was no merger by unity of title and possession which extinguished the easement which the defendant, and those whose estate he has, formerly had in and over the estate of the plaintiff. Certainly there was no such unity in James Gardner. He held the defendant's estate a few months only, from June to September, 1836, before he mortgaged it to Margaret Gardner. When he purchased the estate now owned by the plaintiff, in December, 1839, he had only an equity of redemption in the defendant's estate, if indeed the equity of redemption remained in him till then, which does not distinctly appear.

And it seems equally clear that the two estates did not merge whilst held by Mrs. Gardner as mortgagee only, although mortgagee in fee. So long as she held them, they were both defeasible, and defeasible upon different conditions (the payment of distinct debts), and for aught that appears, conditions to be performed by different persons, because the respective equities of redemption might be held by different persons. So long as she held them, one might have been redeemed and the other foreclosed without any act of hers; and a foreclosure or redemption of either would have entirely effected a separation of the two, each retaining its own incidents. But she conveyed one before foreclosure; and when foreclosed, the estates were in different persons; the defendant's was then held by Gilbert Parker, and the plaintiff's by Margaret Gardner.

When a mortgagor or the assignee redeems, he regains his estate just as it existed when he made the mortgage; the operation of the mortgage is defeated by force of the condition; he takes the estate with all the incidents and benefits, and subject to the servitudes, to which it was subject when the mortgage was made; and no lease, charge, or incumbrance made by the

mortgagee can be set up against the claims of the mortgagor. The estate is restored unchanged.

So if the mortgage is foreclosed, then the estate, which was conditional and defeasible in its creation, becomes absolute; and the incidents, privileges, and covenants attached to it, unchanged by anything which the mortgagor or any other person may have done in the mean time, remain attached to it as if the original conveyance had been absolute. It appears, then, by the facts in this case, that Mrs. Gardner never had at any time an unconditional or indefeasible interest in these two estates. She held mortgages on both at the same time, after having entered on both for condition broken, but before foreclosure; but this was not the unity required to constitute a merger. Before foreclosure she conveyed one of those estates to Gilbert Parker, from whom it came to the defendant. It is clear that at the time of foreclosure the estates were held by different owners in fee. The court are therefore of opinion, that if the defendant, and those whose estates he holds, had a right of way over the plaintiff's tenement, prior to the conveyances to James Gardner, such right was not extinguished by any unity of title and possession set forth in the report.

New trial ordered.

DEFINITION OF EASEMENT in the principal case is approved in *Owen v. Field*, 102 Mass. 103.

OWNER OF LAND CAN NOT HAVE EASEMENT IN IT: *Stuyvesant v. Woodruff*, 47 Am. Dec. 156; *White v. Chapin*, 12 Allen, 518, citing the principal case.

EXTINGUISHMENT OF EASEMENT BY UNITY OF TITLE and possession: See *Hathorn v. Stinson*, 25 Am. Dec. 228. That unity of title in the dominant and servient estates in the same person extinguishes an easement, is a point to which the principal case is cited in *White v. Chapin*, 12 Allen, 518. But a "unity of possession or right that extinguishes a prescriptive right must be such that the party should have an estate in the land *a qua*, and in the land *in qua*, equal in duration, quality, and all other circumstances of right:" *Reed v. West*, 16 Gray, 284. The estate in both tracts must be a permanent, indefeasible estate, and an estate in mortgage is not sufficient, because such an estate is defeasible before foreclosure: *Hancock v. Carlton*, 6 Id. 51; *Curtis v. Francis*, 9 Cush. 457, all citing the principal case.

FORECLOSURE OF MORTGAGE VESTS COMPLETE and indefeasible estate in the mortgagee: *Ballard v. Ballard Vale Co.*, 5 Gray, 471, citing *Ritger v. Parker*.

REDEMPTION BY MORTGAGOR RESTORES ESTATE WITH ALL EASEMENTS and other incidents: *Curtis v. Francis*, 9 Cush. 457, citing the principal case.

HEMPHILL v. CITY OF BOSTON.

[8 CUSHING, 195.]

DEDICATOR OF LAND MAY PRESCRIBE TERMS AND LIMITATIONS upon which he gives it.

LAND DEDICATED FOR SPECIAL AND LIMITED USE, AS FOR FOOTWAY, must be accepted and used for that purpose only.

PERSON USING LAND DEDICATED FOR FOOTWAY AS CARRIAGE-WAY can not recover against the city for an injury to his horse by an obstruction therein, though he uses ordinary care and skill in driving along the way, whether the dedication has been accepted or not.

CASE. The opinion states the facts.

P. W. Chandler, city solicitor, for the defendants.

J. P. Converse, for the plaintiff.

By Court, SHAW, C. J. This was an action on the case for damage done to the plaintiff's horse while used by another. The damage arose from the attempt of the person having charge of the horse to drive through a place in the westerly part of the city of Boston, called Spring-street place. This place is a passage lying between Chambers street and Spring street, having houses built and numbered on each side. To prevent its being a thoroughfare for horses or carriages, a break was made in the grade of the passage, to be ascended and descended by foot-passengers, by three or four steps, about midway between the two streets, across which was also an iron fence, about three feet high, from side to side; midway of this cross-fence were three or four stone posts, so placed as to admit the passage of foot-passengers only. The person driving the plaintiff's horse, in the dark, passed down this place; on arriving at the fence the horse attempted to leap over it, and there sustained the damage for which this action was brought. The city denied that this was a public way for the safety of which they were responsible, and this was the main question. Much evidence was offered upon the question whether this place had been dedicated to the public as a way, prior to statute 1846, chapter 203, by use or otherwise; there was no evidence that it had ever been formally laid out or accepted. The defendants contended that it was a private court, originally laid out by the proprietors, and never open to the public, except by sufferance, nor accepted by the city for any purpose.

Without recapitulating the evidence, or considering the various prayers for instructions in detail, we think there was one

part of the directions to the jury not correct in matter of law, under the circumstances, which operated injuriously to the defendants, against whom the jury returned a verdict.

The great struggle in this case was, whether this place had been dedicated to the public as a way, or not. The defendants contended that this place was appropriated or dedicated to the use of the abutters only, who had purchased lots and built houses upon them, and that it was wholly a private way, for which the city were not responsible. But they contended further, that if it had, by appropriation and use, become public at all, it was for a limited and special purpose only, to wit, a foot-way, and if the plaintiff attempted to use it for a horse and carriage way, it was a misuse and abuse of it, that he did so at his own peril, and must stand responsible for the consequences.

In reference to this question, the judge instructed the jury that if they were satisfied by the evidence that the person in charge of the horse exercised ordinary care and skill, and that the court was open and dedicated to any public use as a way, and had been accepted by the defendants as so dedicated, and if the fence was dangerous, then the plaintiff was entitled to recover; or if the jury were satisfied that the court was opened and dedicated to any public use as a way, but had not been accepted by the defendants, so as to become a public way, yet if the person in charge of the horse exercised ordinary care and skill, and the fence was dangerous, the plaintiff was entitled to recover.

Whether it is competent for any public officer or public body under our statutes newly to lay out a public way for foot-passengers only, it is not necessary to determine. Dedication stands upon a different footing. It is the gift of land by the owner for a way, and an acceptance of the gift by the public, either by some express act of acceptance or by strong implication arising from obvious convenience, or frequent and long-continued use, repairing, lighting, or other significant acts, of persons competent to act for the public in that behalf. This is implied in the statute of 1846. It speaks of ways heretofore opened and dedicated to public use, and not already become a public highway. Here the terms "opened and dedicated" manifestly import "laid out and set apart" by the owner, and the statute implies that something further is necessary to make it a highway in fact. Now he who gives his land to the public may prescribe the terms and limitations on which he gives it, and if it be accepted at all, it must be accepted with the limita-

tions, qualifications, and restrictions prescribed: *Marquis of Stafford v. Coyney*, 7 Barn. & Cress. 257.

If it be given for a special and limited use and purpose, as for a footway, it must be accepted and held for that use only; or it must fail altogether, and then no public right is established by the gift. Taking these principles to be correct, we think the former part of the direction cited was incorrect in this: that if the person in charge of the horse exercised ordinary care and skill, and if the court was opened and dedicated to any public use as a way, and had been accepted, and if the fence was dangerous, then the plaintiff was entitled to recover. The latter part of the direction, we think, was still more exceptionable, to wit, that if the court had been opened and dedicated to any public use, and not accepted, so as to become a public way, yet if the person in charge of the horse exercised ordinary care and skill, and the fence was dangerous, the plaintiff was entitled to recover. We suppose the word "dangerous" thus used, construed in reference to the subject-matter, must be understood to mean dangerous for a horse and carriage to attempt to pass, or to approach; because it was not intimated that the whole passage and the fence, with its upright posts and steps, were not perfectly safe and convenient for foot-passengers, and even well adapted to their use.

Taking this to be the effect of the instruction, it would amount to this, that if land be laid out and appropriated by its owner, as a way to houses or house lots, which he offers for sale, bounding on such land, and lays it out in such a manner as plainly to indicate to all persons entering or approaching the place that it is adapted and intended for foot-passengers only, and incapable of being passed by carriages, horses, or cattle, whether accepted so as to give the public the right to use it or not, then if a person, using ordinary care, attempts to pass it with a horse and carriage, and sustains damage, the city are liable. We think this view of the law can not be sustained in regard to a court, way, or avenue originating in dedication. If it was offered, set apart, and laid out by private proprietors as a court or passage for foot-passengers only, and if by accepting it, expressly or by implication, the public acquired a right to it and in it, as a public easement, it was for a footway only; and then if the plaintiff attempted to use it as a way for other or all purposes, the city was not responsible for damage occasioned by such unauthorized use. If it had not been accepted so as to become a public way for any purpose, or if it was not compe-

tent for the defendants to accept it for a qualified and limited purpose, as for a footway, then it remained private property, and the public are not responsible for the accident. It would be the ordinary case of a traveler who should accidentally stray from the highway in the dark and meet with damage; it is damage for which the town is not responsible, unless it was caused by some neglect, by which the highway strayed from was dangerous, and caused the damage.

The plaintiff contends that if the way in question, that is, Spring-street court, across which was the fence complained of, had then, at the time of the accident, been dedicated and accepted, it is to be deemed a highway, and as such highway was to be taken care of under the general statute.

If by this proposition the counsel for the plaintiff is to be understood to insist that it was to be taken care of, and kept safe and convenient for all kinds of travel, as in the statute respecting highways, so as to include a horse and carriage, the proposition is wholly untenable, for the reasons already stated. If it intends nothing more than that it must be kept safe and convenient for foot-passengers, it has no bearing on the present case.

Verdict set aside, and new trial ordered.

DEDICATION MAY BE PARTIAL AS TO TIME AND MODE OF USE: See the note to *State v. Trask*, 27 Am. Dec. 567, in which the law of dedication is discussed at considerable length. A dedication must be understood and construed with reference to the purpose and object for which it was made: *Godfrey v. Alton*, 52 Id. 476. Land dedicated for one purpose can not be applied to a different use by the legislature: *Le Clercq v. Gallipolis*, 28 Id. 641, and note. In *Morse v. Stocker*, 1 Allen, 154, the principal case is cited to the point that a dedicator of land may prescribe the terms and limitations upon which he gives it, and if accepted it must be upon those terms and limitations; as where it is dedicated for a limited purpose or use. So in *Gould v. Boston*, 120 Mass. 304, it is cited to the proposition that where land is dedicated for a footway only, one who is injured by a defect therein while using it as a carriage-way can not recover therefor. The case is also referred to incidentally, on the point that a dedication may be for a limited use, in *Danforth v. Durell*, 8 Allen, 244. In *Tyler v. Sturdy*, 108 Mass. 201, the principal case is also cited to the point that a public footway may be created by dedication.

OTHER POINTS TO WHICH THE PRINCIPAL CASE IS CITED ARE: That a dedication of a way is a gift of land by the owner for a way: *Hayden v. Stone*, 112 Mass. 349; that a way by dedication is a way over land which the owner thereof has dedicated to the use of the public for a way: *Hayden v. Attlebury*, 7 Gray, 344; that it is an open question whether any public officer or body can lay out a public way for foot-passengers only: *Oliver v. Worcester*, 102 Mass. 495; *Gould v. Boston*, 120 Id. 305.

LAWTON v. FITCHBURG RAILROAD Co.

[8 CUSHING, 230.]

AGREEMENT MUST BE PERFORMED IN REASONABLE TIME, IF NO TIME IS MENTIONED, where a railroad company agrees to fence its road through one's land.

PERFORMANCE AFTER ACTION COMMENCED OF AGREEMENT BY RAILROAD COMPANY TO FENCE its road through the plaintiff's land in adjustment of damages for the right of way, if such performance was without the plaintiff's consent, does not affect his right to recover damages for not fencing in a reasonable time.

MEASURE OF DAMAGES AGAINST RAILROAD COMPANY FOR NOT FENCING its road through the plaintiff's land in accordance with its agreement, in settling for the right of way, is such sum as it would fairly cost to make the fences as agreed, notwithstanding the erection of fences after the action was commenced, without the plaintiff's consent.

ACTION for damages for breach of an agreement by the defendants to fence both sides of their road, in a specified manner, through the plaintiff's land, "in consideration of an amicable settlement" for the land appropriated for the use of the road. The road was built through the plaintiff's land in 1844, but no fences were erected as agreed prior to the commencement of this action in 1849. After the action was brought, the defendants erected fences of the kind specified in the agreement, and insisted that the plaintiff could recover damages only for the injury sustained in not erecting the fences in a reasonable time, and not for the cost of the fences. The plaintiff insisted and gave evidence to show that the erection of the fences after action brought was without his consent and against his protest, and that his right to recover was not impaired thereby, and the court so instructed the jury. The instruction as to the measure of damages is stated in the opinion. Verdict for the plaintiff; exceptions by the defendants.

E. Buttrick, for the defendants.

N. P. Banks, jun., for the plaintiff.

By Court, METCALF, J. As the agreement of the parties mentioned no time within which the fences were to be erected, the law required that they should be erected within a reasonable time; and the defendants do not deny that they failed to erect them within such time. There was, therefore, a breach of the agreement when this action was commenced, and the plaintiff then had a right to recover damages for the breach. This right was not impaired nor affected by the subsequent erection of the

fences by the defendants, without the plaintiff's consent or approbation: *Gould v. Banks*, 8 Wend. 567 [24 Am. Dec. 90]. And so the jury were instructed. They were further instructed that the plaintiff was entitled to recover, as damages, the sum which it would fairly cost to erect the fences according to the agreement. The correctness of these instructions is questioned by the defendants' counsel; because, as he suggests, they authorized the jury to give greater damages than the plaintiff may have suffered by the defendants' omission to erect the fences. But there is no legal force in this suggestion. The injury to the plaintiff's land, by reason of its remaining unfenced, is not the ground of the damages which he sought to recover in this action. The defendants took his land for their railroad, and he amicably settled with them for such taking, upon their agreeing to put up fences on the sides of their road. The erection of the fences by them was a part of the consideration of the settlement for the land taken by them. The fair cost of the fences was the amount of that part of such consideration. The plaintiff chose to have fences between his land and the railroad; and if the defendants had not agreed to erect them, he would or might have demanded of them, as a condition of settlement, the sum necessary to enable him to erect and maintain them himself. Whether, therefore, there was any necessity for these fences, in order to protect his lands, or whether he has suffered any injury in his lands from the want of fences, is no part of the present inquiry. He offered no evidence on these points at the trial. If he had proved such injury, another question might have been raised respecting the rule of damages. As the case stood at the trial, the instructions given to the jury were, in our opinion, correct.

Judgment on the verdict.

CONTRACT MUST BE PERFORMED IN REASONABLE TIME WHERE NO TIME SPECIFIED, WHEN: See *Philips v. Morrison*, 6 Am. Dec. 638; *Atwood v. Cobb*, 26 Id. 657, and note 671.

COVENANT BY LAND OWNER TO FENCE RAILROAD TRACK through his land is absolute, and does not depend upon the question whether such fences are necessary or expedient: *Bronson v. Coffin*, 108 Mass. 190, citing the principal case.

MEASURE OF DAMAGES FOR BREACH OF CONTRACT BY RAILROAD COMPANY TO FENCE its track: See on this point *Logansport etc. R. Co. v. Wray*, 52 Ind. 578, 582, where the principal case is approved and followed.

FIRST PARISH IN SHERBURNE v. FISKE.

[8 CUSHING, 264.]

ASSESSORS ARE NOT SERVANTS OR AGENTS OF TOWN OR PARISH so as to be civilly liable to such town or parish for neglect of duty.

PARISH ASSESSORS ARE NOT LIABLE TO PARISH FOR NEGLECT TO ASSESS the full tax voted by the parish, where they act in the *bona fide* belief that they are performing their duty; so especially, where the tax, if assessed, would have been illegal.

TAX ASSESSED BY ASSESSORS NOT SWORN as required by law is illegal.

PARISH ASSESSORS ARE NOT LIABLE TO PARISH FOR NEGLECT TO QUALIFY by taking the oath required by law.

CASE against the defendants as assessors of the parish for neglect to assess the taxes voted by the parish for certain years. It appeared that the parish voted, in accordance with a communication from their minister, to raise the same sum by assessment for the years specified as was raised in 1845, and that the tax be assessed upon the same scale; that yearly subscriptions be also raised, to be added to the assessment; that a certain sum be allowed for the minister's salary and a certain other sum for incidental expenses, any surplus beyond these sums to go to the society. The defendants in fact apportioned for the years mentioned considerably smaller sums than that raised in 1845, though these sums were fixed by using the same rate of tax as in that year. The amounts actually collected were still less than the sums assessed, but were sufficient, with the yearly subscriptions, to pay the minister's salary and the incidental expenses. It also appeared that the defendants, though duly chosen, were never sworn as assessors. Upon these facts the case was submitted on an appeal from the common pleas.

A. H. Nelson and J. P. Converse, for the plaintiffs.

J. G. Abbott and G. A. Somerby, for the defendants.

By Court, DEWEY, J. The relation of assessors to the town or parish by which they are elected is not that of a servant and master, or agent and principal, in any such sense as will subject the assessors to a civil action by the town or parish, to recover damages for negligence in the discharge of the public duty devolved upon them by such appointment. Assessors are officers created by statute, with prescribed duties required to be performed under oath. To some extent such public officers are punishable by indictment, or by penalties or forfeitures that have been by law annexed to the neglect of their duties.

They are also, to a certain extent, liable to individuals for any

illegal official acts injurious to them, but this liability has been much modified by the statute provision, making such assessors responsible only for fidelity and integrity on their part.

The views of this court in the case of *White v. Phillipston*, 10 Met. 108, strongly sustain the position that public officers are not, in this form of a civil action, held responsible for damages to the town, arising from their neglect of duty in the absence of any statute giving such remedy to the town: See *Trafton v. Alfred*, 15 Me. 258; *Kendall v. Stokes*, 3 How. 87; *Commonwealth v. Genther*, 17 Serg. & R. 135; *Wilson v. The Mayor etc. of New York*, 1 Denio, 595 [43 Am. Dec. 719]. If liable at all to the town or parish from which they received their appointment, they are so certainly only for want of fidelity and integrity, or for not discharging their duties according to their best judgment and understanding; and upon this ground the facts stated in the present case would seem to warrant the inference that as to the manner of making these assessments they acted under the honest belief that they were making the same in accordance with the views of the parish, as indicated by the facts before them.

There is still another view of this case, alike favorable to the defendants. So far as the action is brought to recover damages against the assessors for not making a larger assessment, and not making a warrant to enforce the collection of the same, the plaintiffs have sustained no damage. Such tax, if made by them, would have been illegal, if, as the plaintiffs allege, and as the facts seem to be, the assessors were not legally qualified by taking the oath required by law; and if the tax had been collected and paid over to the parish, the same might have been recovered back as wrongfully paid. This omission to take an oath of office is not a neglect for which the present action can be maintained. As to assessors of towns, a penalty is provided by law for neglect to qualify as such, but as to the assessors of parishes, it seems no such provision exists, and in neither case does a civil action lie for such neglect.

Judgment for the defendants.

OFFICER NOT SWORN ACCORDING TO LAW, VALIDITY OF ACTS OF: See *Farmers' etc. Bank v. Chester*, 44 Am. Dec. 318.

HEARD *v.* PIERCE.

[8 CUSHING, 338.]

GRAND JURY IS APPENDAGE OF COURT, AND WITNESSES BEFORE IT ARE AMENABLE to the court precisely as are witnesses before the trial jury. GRAND JURY MAY DIRECT OFFICER TO DETAIN CONTUMACIOUS WITNESS who refuses to be sworn and behaves disrespectfully before them, and to take him before the court, and such witness is liable for an assault upon the officer to escape detention.

EVERY GENERAL POWER OR DUTY GIVEN OR ENJOINED IMPLIES EVERY PARTICULAR POWER necessary to its exercise or performance.

TRESPASS for an assault and battery. The case, which came up on exceptions from the common pleas, is stated in the opinion.

J. G. Abbott, for the plaintiff.

B. F. Butler, for the defendant.

By Court, FLETCHER, J. The material facts in this case, which is trespass for an assault and battery, may be very briefly stated. The defendant was duly summoned as a witness to testify before the grand jury, and appeared before them but refused to be sworn, and conducted himself improperly and disrespectfully toward the jury. The plaintiff, who was the officer in attendance on the grand jury, was directed by them to detain the defendant in custody, that he might be brought before the court to be dealt with for his refusal to be sworn and his improper and disrespectful conduct toward the jury. For the purpose of considering the question raised in the case, the above statement may be taken as setting out the substance and effect of the action of the jury, without stating the particulars contained in the report. While the plaintiff, as such officer in attendance upon the grand jury, had the defendant in his custody, by their direction and authority, for the cause aforesaid, and for the purpose of taking him to the court to obtain their direction and aid in the matter, the defendant committed the assault and battery upon the plaintiff, which form the subject of this suit.

The fact stated in the report, that the judge was out of town, is not a material fact in this case, as the length of time during which the defendant was actually detained was not sufficient to raise any distinct question on that ground, if any could ever be raised, when the detention was not longer than was necessary to take the party before the court. But still the fact that the

judge was absent from the city in which the jury were sitting is a fact worthy of notice. As the grand jury is an appendage of the court, is organized by the court, sits and deliberates under the authority of the court, and may at all times apply to the court for instructions and aid, it is essential that there should at all times be a court to which the jury can have access.

In the present case in the court below the defendant filed a specification of defense, that the alleged assault and battery were made in self-defense, and to free himself from unlawful restraint and detention, and that he used no more force than was necessary for this purpose. The judge instructed the jury that the plaintiff, acting as an officer under a verbal direction from the district attorney or grand jury, or from both of them, had no authority to detain the defendant or to restrain him, for the purposes aforesaid; that the defendant had a right to free himself from such unauthorized detention and restraint, and if he used no more force than was necessary for this purpose, was not liable to the plaintiff in this action.

The inquiry is, whether this instruction was correct. The question may be briefly stated to be, whether, when a witness is duly summoned to appear before the grand jury and appears, but refuses to be sworn, or to answer questions proposed to him, and accompanies his refusal with profanity and disrespectful conduct toward the jury, they can lawfully direct and require the officer in attendance upon them to take the witness into custody, and take him to the court for the purpose of obtaining its aid and direction. This is certainly a grave question, as practically affecting the powers of a grand jury to perform their important duties. There is much interesting learning in the books of the law in regard to the antiquity, the origin, the character, the course of proceeding, and the powers of grand juries, and as to their legal relation to the court. In the several states of this Union, different provisions have been made and different views are entertained in regard, among other things, to the qualifications, the powers, and the course of proceedings of these bodies.

But with reference merely to the present case, it will be sufficient to consider the powers of grand juries, and their legal relations to the court, under and by virtue of the laws of this commonwealth; but though particular reference will be had to the laws of this commonwealth, yet it is believed that there is nowhere any adjudged case, or any established principle of law, which conflicts with the opinion which the court have formed.

The legislature, recognizing a grand jury as an existing portion of our judicial system, have made various provisions in regard to selecting, summoning, and returning them to court, and in regard to organizing them and regulating their proceedings. The court issues its process for the return of grand jurors, and they are returned to the court to serve at the term or terms thereof; the court is the judge of their qualifications; they are sworn in court, and charged by the court; and being thus organized and impaneled in court, and by the authority of the court, they retire with the officer appointed to attend them. By their oath the jury are diligently to inquire, and true presentment make, of all such matters and things as shall be given them in charge. Their inquiries are thus confined to the jurisdiction of the court for which they inquire. Witnesses may be summoned and brought in by *capias*, if necessary, by the court, and be sworn in court to testify before the grand jury, and are amenable to the court whose province it is to decide such questions as may arise in regard to the obligation of witnesses to be sworn, or to answer interrogatories, and the court have the power to enforce their decisions by commitment for contempt. The bills found by the grand jury, with a list of all witnesses sworn before them, are returned to the court, and their presentments are made to the court, and when their labors are ended they are dismissed by the court. The grand jury, therefore, like the petit jury, is an appendage of the court, acting under the authority of the court, and the witnesses summoned before them are amenable to the court precisely as the witnesses testifying before the petit jury are amenable to the court. These views are supported by adjudged cases as well as by familiar principles.

In the case of *Rex v. Hunter*, 3 Car. & P. 591, the grand jurors came into court, and Lord Deerhurst stated, "that a lady named Parratt, who was a witness on this indictment, had refused to produce certain deeds, which it was material for the grand jury to see; neither of these deeds being the deed alleged to be forged; and his lordship further stated, that the grand jury wished to know whether they could compel the production of these deeds." Mr. Justice Park, having conferred with Mr. Justice J. Parke, said: "My learned brother and myself are of opinion, that, if these deeds form a part of the evidence of this lady's title to any part of her own estate, you can not compel her to produce them; but if it should appear that they do not relate to the title of any part of her estate, she is bound to pro-

duce them before you." Here the court took jurisdiction of the question, as to the obligation of the witness before the grand jury to produce the papers called for, and would no doubt have enforced their decision, if necessary, by the compulsory process of the court against the witness.

So in the case of *Ward v. The State*, 2 Mo. 120 [22 Am. Dec. 449], a witness before the grand jury refused to answer a question, on the ground that he could not answer without implicating himself, but the court ruled that he was bound to answer, and upon his persisting in his refusal to answer, the court committed him to prison till he should consent to give the evidence required, and till the further order of the court.

It does not appear in what particular manner or form this matter was brought before the court, but the court took cognizance of the question as to the legal obligation of the witness to give the evidence required, and enforced its decision by committing him to prison, and it was expressly held that the grand jury "act under the authority of the court."

In truth, it is the result of the authorities as well as of just reasoning that the grand jury is an appendage of the court acting under its authority, and that the witnesses before the grand jury are subject to the lawful authority and control of the court in the same manner as are the witnesses before the jury of trials; the practical difference consisting in the fact that the witnesses before the grand jury do not, as do the witnesses before the jury of trials, testify in the presence and under the eye of the court. It is this difference which has given rise to the question in the present case.

Various reasons have been assigned by different writers for the secrecy observed in the proceedings of grand juries, and by some this secrecy has been regarded as deforming judicial proceedings under the common law, whose publicity, it has been said, is their honest boast. Contrary to the general usage, in some of the United States, it is understood that persons accused are permitted to appear before the grand jury and examine the witnesses. This is not allowed under our judicial system; and though contrary to the general spirit of our institutions, which court publicity, yet grand jurors, for wise purposes, are bound to secrecy by the terms of their oath. But upon this subject it is not needful now to enlarge.

In examining the question under consideration it is necessary to refer to the duties of grand juries. It is their duty, to the performance of which they are bound by their oath of office,

diligently to inquire and true presentment make of all such matters and things as shall be given them in charge. But how are they to inquire? They can inquire only by examining witnesses whom they have a right to have summoned and compelled to appear before them and to submit to be examined on oath, and to answer interrogatories and give evidence. But if a witness refuses to be sworn, alleging that he is under no legal obligation to take the oath, or refuses to answer an inquiry, on the ground that he is not bound by law to give the evidence required, what shall the jury do? These are questions of law, which they can not decide, and if they could, they have no compulsory power, independent of the court, to enforce their decision. These are questions which can be settled only by the court, and the court only has the power to compel a witness to do what may be adjudged by the court to be his duty.

If, therefore, a witness refuses to be sworn, or to answer inquiries and give evidence, or misbehaves, the jury can not perform the duty imposed upon them by law without the aid of the court. But how shall that aid be obtained? The court can not be required to go to the jury-room, and if it could, it might be wholly unavailing, if the jury have no power to detain the witness, to await the action of the court. If, then, grand juries have not the lawful authority and power to detain a witness, and take him to the court to obtain the decision of the court on questions of law, and to get the aid of the compulsory power of the court to enforce the decision, they are without the power necessary to enable them to perform the duties imposed on them by law; the law requires them to perform duties which they have not the power by law to perform. Now, it is admitted that there is no direct, express provision of law, common or statutory, which gives to grand juries, in terms, the power to detain a witness in custody, and take him before the court; but if there be a well-known and acknowledged principle of law, which clearly and fully warrants the exercise of that power, that is as sufficient and satisfactory as an express provision; an implied power is just as legitimate as an express power. The court can not make laws, but the court may and should apply an admitted principle of law to new cases, as they may arise, and fall within the operation of the principle.

There is a principle of law of great antiquity, universally known and admitted and acted on, which fully sustains the position that the grand jury have an implied power to detain a witness in custody and take him before the court, when neces-

sary to get the aid of the court to compel him to give evidence. This principle of the law is thus stated, in substance, by Lord Coke: Where a statute gives power to the justices to require any person to take the oaths or do any other thing, the law, by necessary implication, gives them power to issue their precept to arrest the parties, for when the law granteth anything to any one, that also is granted without which the thing itself can not be used; it is against the office of the justices, and the authority given them by the law, that they should go and seek the parties: 12 Co. 131; Dwarris on Stat., 2d ed., 671.

The case above stated is very strongly analogous to the present case. It was held that the justices, without any express power, had an implied power to issue their precept to bring parties before them, because the statute gave the justices express power to require any person "to take the oaths," and to exercise their express power, it was necessary to bring the parties before them.

So in the present case, the grand jury had a duty to perform, in the performance of which they had a right to the aid of the compulsory power of the court to compel the witness to give evidence; but in the language of Lord Coke, "it is against the office of the justices and the authority given them by law," that they should go to the jury or the witness; and it was therefore necessary, and the jury consequently had the implied power, to detain the witness and take him to the court. In truth, without the power to take refractory witnesses, or witnesses who honestly interpose unfounded objections to giving evidence, before the court, for its direction and aid, the grand jury would be wholly unable to perform the duties imposed upon them by law.

No act of congress confers on the United States courts the right to summon grand juries, or describes their powers. The laws of congress have invested the courts of the United States with criminal jurisdiction, and since the jurisdiction can only be exercised through the instrumentality of grand juries, the power to summon them results by necessary implication. Hence, the powers of grand juries are co-extensive with and are limited by the criminal jurisdiction of the court of which they are an appendage: *United States v. Hill*, 1 Brock. 156. The doctrine of that case, as to power by implication, applies with conclusive force to the present case.

The general rule is well established, that when a general power is given or duty enjoined, every particular power neces-

sary for the exercise of the one or the performance of the other is given by implication. *Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud*: *Foliamb's Case*, 5 Co. 115 b; *Miller v. Knox*, 4 Bing. N. R. 574, 583; *Overseers of Pittstown v. Overseers of Plattsburgh*, 18 Johns. 407, 418; *Field v. The People*, 2 Scam. 79; *Witherspoon v. Dunlap*, 1 McCord L. 546.

The present case comes clearly within the general principle. The witness here not only refused to be sworn, but accompanied his refusal with profanity and disrespectful conduct to the jury. A power to detain such a witness and take him to the court is manifestly essential to enable the jury to exercise the powers expressly given them, and to perform the duties imposed upon them by law. To hold that a grand jury have no power to protect themselves against indignities from a refractory witness would seem clearly to be inconsistent with the powers they possess, and the high and important duties which they are called upon to perform. The express provision of the statute, that there shall be an officer appointed to attend upon the grand jury, is not without its significance. It may be proper to suggest as a matter of form, that it may be suitable, whenever the grand jury have occasion to take a witness to the court, that the jury themselves should go into court with the officer and the witness, that the questions may be stated, or the decision of the court made, in the presence both of the jury and the witness.

The decision of the court in this case is, that the grand jury had, under the circumstances, rightful authority and power to require the officer to detain the defendant in custody and take him to the court to be dealt with, and that the restraint and detention of the defendant by the plaintiff was not unlawful but lawful, and that the justification set up by the defendant for the assault and battery committed by him on the officer can not upon the facts of the case be maintained. The exceptions to the ruling of the court below are therefore sustained, and the verdict set aside and a new trial granted, in the court of common pleas.

POWER OF GRAND JURY TO COMPEL WITNESSES TO ATTEND AND TESTIFY.—It is settled, as laid down in the principal case, that the grand jury, being not an independent body, but an appendage of the court, has no power of its own to compel witnesses to attend and testify before it, or to punish them for non-attendance or refusal to testify or other misbehavior, but, for those purposes, must invoke the authority of the court: *Thomp. and Merriam on Juries*, secs. 596, 617, 624; *Proffatt on Jury Trial*, sec. 55; *Commonwealth v. Bannon*, 97 Mass. 219; *Whitcomb's Case*, 120 Id. 121. Witnesses are summoned before it by the process of the court: *Thomp. and Merriam on*

Juries, sec. 624. If witnesses refuse to attend when summoned, they may be attached and punished therefor by the power of the court; so if they attend and refuse to testify as to a matter not privileged or are otherwise contumacious, the court may, upon a proper presentation of the matter, punish them as for a contempt: 1 Ch. Crim. L. 321. No doubt also the grand jury may cause the officer in attendance upon them to detain a contumacious witness and to take him before the court to be dealt with, where the court is not at the time in session. But the grand jury itself can not punish a refractory witness. It may cause witnesses to be summoned, and may examine them as to any matter in inquiry before it: Thomp. and Merriam on Juries, sec. 615; *Ex parte Brown*, 72 Mo. 83, 94; *State v. Parrish*, 8 Humph. 80. Or the court may, in some jurisdictions, summon witnesses and swear them and send them before the grand jury: *Grand Jury v. Public Press*, 4 Brewst. 313. But in any case, the power of dealing with a witness called before the grand jury, where he proves refractory, rests with the court.

WESTON v. SAMPSON.

[8 CUSHING, 347.]

PUBLIC HAVE, BY COMMON LAW, GENERAL RIGHT OF FISHING IN SEA AND ARMS thereof, wherever the tide ebbs and flows, which right is not affected by any grant of the soil, nor can it be abridged by a private grant from the sovereign of an exclusive right of fishery to an individual, unless it be an ancient grant, though it is subject to legislative control.

RIGHT OF TAKING SHELL-FISH IS INCLUDED IN PUBLIC RIGHT of fishing in tide-waters whether such shell-fish are imbedded in the soil or lie upon its surface.

PUBLIC RIGHT OF FISHERY IN SEA AND ITS ARMS WAS EXTENDED TO COLONISTS in Massachusetts under the charters from the crown.

MASSACHUSETTS COLONY ORDINANCE OF 1641 EXTENDING UPLAND OWNER'S RIGHT to the soil on tide-water to low-water mark applies, by long usage, to lands in the old Plymouth colony.

RIGHT OF DIGGING CLAMS BETWEEN HIGH AND LOW-WATER MARK on tide-waters does not belong exclusively to the owner of the upland under the Massachusetts colony ordinance of 1641 so as to render other persons inhabitants of the town liable to him in trespass for digging clams there.

TRESPASS *quare clausum fregit*. The trespass complained of was that the defendants, inhabitants of Duxbury, dug five bushels of clams between high and low-water mark on land adjacent to the plaintiffs' upland in Duxbury bordering on the bay.

H. A. Scudder and T. P. Beal, for the plaintiffs.

W. Baylies and W. Thomas, for the defendants.

By Court, SHAW, C. J. The question in this case is probably one of very little importance to the parties in point of amount, but it presents a question of considerable interest to the inhabitants

of the maritime districts of the state. The statement of facts is so shaped as to present the single question of the right of an inhabitant of Duxbury to enter upon the shore or flats, between high and low-water mark, lying in front of land, the acknowledged property of another, and within one hundred rods of high-water mark, for the purpose of taking and carrying away clams therefrom.

The action is trespass *quare clausum*, and the facts find that the defendants did not pass over or enter upon the plaintiffs' upland, but that they passed to the place from tide-water in a boat, dug five bushels of clams and placed them in their boat, and went away and carried the clams in their boat. It follows, of course, that they must have gone to the spot whilst the flats were so much covered with tide-water as to float the boat, waited till low water, then dug the clams, and then waited until there was sufficient flood tide again to float their boat. This is the breach of the plaintiffs' close, of which they complain.

There is no doubt that by the common law of England, all the subjects of the king have a common and general right of fishing in the sea, and in all bays, coves, branches, and arms of the sea, which in general is held to extend to all places where the tide ebbs and flows. The general rule is expressed by Lord Hale, *De Jure Maris*, Hargr. Law Tracts, 11, that all the people of England have a liberty of fishing in the sea, as of common right, and of this they can not be lawfully deprived, even by the grant of the king: *Carter v. Murcot*, 4 Burr. 2162; *Warren v. Matthews*, 1 Salk. 357. This was conceded by all the judges, although divided in opinion in other respects, in the case of *Blundell v. Catterall*, 5 Barn. & Ald. 268.

And it is not at all inconsistent with this common and general right that the king is held to be owner of the soil under the sea, which royal right, by the common law of England, extends over the shore where the tide ebbs and flows to ordinary high-water mark. And it has been frequently held that the king takes this right of soil in trust for the public, so far as the fishing is concerned; and although the king may grant away this right of soil to another, yet his grantee will take it subject to the same trust; and by such grant, however comprehensive in its terms, the public, that is, the king's subjects, can not be deprived of their common right. This distinction between the *jus privatum* of the crown and the *jus publicum* of the people is strongly stated by Lord Hale, *De Portibus Maris*, and is confirmed in recent cases of high authority: *Attorney General v.*

Burridge, 10 Price, 350; *Attorney General v. Parmeter*, Id. 378; *Parmeter v. Gibbs*, Id. 412.

In some of the cases it has been held that one may have an exclusive right of fishing in an arm of the sea; but this is not so *prima facie*, and must be proved by ancient grant. And it has been repeatedly held that such right can not be founded on the king's grant, made within the time of memory; and that no such right could be conferred by authority of the crown under Magna Charta: 2 Bla. Com. 39; *Warren v. Mathews*, 6 Mod. 73; *Somerset v. Fogwell*, 5 Barn. & Cress. 884.

The right of fishing in the sea, and in bays, arms of the sea, and in navigable or tide waters, under the free and masculine genius of the English common law, is a right, public and common to every person: 3 Kent's Com., 6th ed., 413. The same doctrine is stated and enforced by a large citation of authorities in 2 Dane's Abr. 690, and in Angell on Tide Waters, 2d ed., 125 et seq.

In stating the principles, that by the common law the right of fishing may be public, although the soil in which it is used is private property, it is proper to add, that this public right may be regulated and abridged by the legislature, who have the control and guardianship of all public rights. In England this is often done by act of parliament, regulating ports and harbors, and authorizing wharves, docks, and other erections, which to some extent may abridge the public right of fishing. This is usually done in consideration of greater public good expected from such inclosures: *The King v. Montague*, 4 Barn. & Cress. 598.

This common and general right of fishing in the sea and on its shores, at common law, being established, we think it is equally well determined by the authorities, that this right extended to shell-fish, as well those which are embedded in the soil as those which lie on the surface: *Bagott v. Orr*, 2 Bos. & Pul. 472; *Martin v. Wadell*, 16 Pet. 414; *Peck v. Lockwood*, 5 Day, 22.

Assuming that this was a common-law right for all English subjects at the time of the emigration of our ancestors, we have no doubt, that by the charters of Charles I. and James I., under which the land of the colony of Massachusetts was granted, for the purpose of founding a colonial government of English subjects, all the rights to the sea and sea-shores, with the incidental rights of fishing, were granted to the colonists. It is unnecessary to inquire, whether the *jus publicum*, so far as general control and protection were concerned, remained to the crown or

not; all the right, both to the soil under the sea, as far as by the law of nations one government is conceded to hold an exclusive right to the sea-coasts, and to the shores and arms of the sea, where the sea ebbs and flows, did vest in the grantees under those charters. Whatever right or jurisdiction, if any, remained in the crown after those grants, it is clear that it ceased on the establishment of independence, and has remained absolute in the states: *Pollard v. Hagan*, 3 How. 212; *Gough v. Bell*, 1 Zab. 156.

If, then, the right of fishing on the shores of the sea, including the right to take shell-fish from the soil, was a common-law right, extending to the English colonies generally, and especially to Massachusetts, the question is, whether anything has been done by the colonial or provincial government, or by the government of the commonwealth, to impair or abridge that right. Though the laws of the colony of Plymouth have been published within a few years, we believe that they contain no provision bearing on this subject. But the colony ordinance of 1641 is relied on, and we believe mainly relied on, as giving to owners of land bounding on tide-waters "propriety," or right to the soil, so far as the tide ebbs and flows, where it does not ebb more than one hundred rods. The premises in which the trespass in this case is assigned lie in the town of Duxbury, within the limits of the old colony of Plymouth, and were not within the territorial jurisdiction of the colony of Massachusetts when the ordinance in question was passed; and therefore that ordinance, as positive law, did not, *proprio vigore*, extend to this territory. But the great principle established by the colony ordinance, extending the right of soil of the upland owner to low-water mark, has been held to extend, by long usage, to Maine: *Storer v. Freeman*, 6 Mass. 435 [4 Am. Dec. 155]; *Codman v. Winslow*, 10 Mass. 146; *Lapish v. Bangor Bank*, 8 Greenl. 85; to Plymouth: *Barker v. Bates*, 13 Pick. 255 [23 Am. Dec. 678]; and to Martha's Vineyard: *Mayhew v. Norton*, 17 Id. 357 [28 Am. Dec. 300]; though all of these were under other territorial governments at the time the colony ordinance was passed. We have no doubt, therefore, that the plaintiff, as riparian owner, has the same proprietary interest in the soil as if it were within the old territory of Massachusetts.

But although the riparian proprietor has an interest in the soil, it is not an absolute and unqualified ownership; but so long as flats so situated are left open, unoccupied by any wharf, dock, or other inclosure, so long as the tide ebbs and flows over them,

they so far retain their original character and remain public. This double rule, to which the territory lying between high and low-water mark may be subject, is not a novelty in the law, but an old and recognized principle. In *Sir Henry Constable's Case*, 5 Co. 107, it was held, that when the tide was up, the place and acts done upon it, were within the jurisdiction of the admiralty; when bare, being within the body of the county, the common law had jurisdiction. It is quite certain, we think, that the mere fact that the *jus privatum*, or right of soil, was vested in an individual owner does not necessarily exclude the existence of a *jus publicum*, or right to the fishery in the public. The rule, established by usage and judicial decision, has been, that although the ordinance transfers the fee to the riparian owner, yet until it is so used, built upon, or occupied, by the owner, as to exclude boats and vessels, the right of the public to use it is not taken away; but that whilst open to the natural ebb and flow of the tide, the public may use it, may sail over it, anchor upon it, fish upon it, and by so doing commit no trespass, and do not disseise the owner: *Austin v. Carter*, 1 Mass. 231.

This court are therefore of opinion, that where flats are left wholly open to the natural ebb and flow of the tide, unoccupied and uninclosed by the upland proprietor, the right of fishing on the part of the public is not excluded; and that the law, in this respect, makes no difference between shell-fish and swimming or floating fish: See *Parker v. Cutler Milldam Co.*, 20 Me. 357 [37 Am. Dec. 56].

The only remaining question is, whether there is any other statute provision in force which may take away or change the right, claimed by the defendants, to take clams in Duxbury. By the revised statutes, c. 55, secs. 11, 12, all persons are prohibited from taking oysters from their beds, unless by permits there specified, with an exception that every inhabitant may take oysters, without a permit, for the use of his family. The shell-fish taken in this case were not oysters, nor does it appear that they were not taken by the defendants for the use of their families. Section 13 prohibits the taking of other shell-fish, but it is limited to certain towns, of which Duxbury is not one. It was a revision of former particular acts. All these also contain a proviso that they shall not prevent any fisherman from taking any quantity of shell-fish he may want for bait, not exceeding seven bushels at one time.

With these views of the law, the court are of opinion, upon the facts stated, that the action can not be maintained.

Plaintiffs nonsuit.

PUBLIC RIGHT OF FISHERY IN NAVIGABLE WATERS: See *Carson v. Blazer*, 4 Am. Dec. 463; *Broune v. Kennedy*, 9 Id. 503; *Commonwealth v. Chapin*, 16 Id. 386; *Rogers v. Jones*, 19 Id. 493; *Lansing v. Smith*, 21 Id. 89; *Parker v. Cutler Milldam Co.*, 37 Id. 56. As to the right of individuals to acquire and hold several rights of fishery in such waters, see *Collins v. Benbury*, 38 Id. 722; S. C., 42 Id. 155, and notes. To the point that the public have a common right of fishery in navigable waters, whether the soil under them is owned by individuals or not, the principal case is cited in *Smith v. Maryland*, 13 How. 75; *Dunham v. Lamphere*, 3 Gray, 271; *Lakeman v. Burnham*, 7 Id. 440, 441; *Proctor v. Wells*, 103 Mass. 218. This public right of fishery is, however, subject to reasonable regulation by the state: *Holyoke Co. v. Lyman*, 15 Wall. 510.

RIGHT OF TAKING SHELL-FISH IN NAVIGABLE WATERS: See *Arnold v. Mundy*, 10 Am. Dec. 356, and note. That the public right of fishing in waters where the tide ebbs and flows, includes shell-fish as well as other fish, is a point to which *Weston v. Sampson* is cited in *Lakeman v. Burnham*, 7 Gray, 441; *Commonwealth v. Bailey*, 13 Allen, 542; *Proctor v. Wells*, 103 Mass. 217.

RIGHT OF RIPARIAN OWNER UNDER MASSACHUSETTS COLONY ORDINANCE OF 1641 TO FLATS BETWEEN HIGH AND LOW-WATER MARKS: See *Storer v. Freeman*, 4 Am. Dec. 135; *Barker v. Bates*, 23 Id. 678; *Duncan v. Sylvester*, 41 Id. 400; *Gerrish v. Proprietors of Union Wharf*, 46 Id. 568, and notes. That the right of riparian owners in such flats is subject to the public right of fishery, is a point to which the principal case is cited in *Locke v. Motley*, 2 Gray, 266.

PUBLIC RIGHT OF FISHERY IN NAVIGABLE WATERS NOT ABBRIDGED BY COLONY ORDINANCE OF 1641: See *Parker v. Cutler Milldam Co.*, 37 Am. Dec. 56; *Duncan v. Sylvester*, 41 Id. 400.

COFFIN v. DUNHAM.

[8 CUSHING, 404.]

HUSBAND IS NOT LIABLE TO WIFE'S COUNSEL IN DIVORCE SUIT brought against her, in which she prevails, for his fee.

ASSUMPSIT by a counselor at law to recover for services rendered the defendant's wife in a divorce suit brought against her by the defendant, in which she prevailed. The common pleas held the defendant not liable, and gave him judgment, from which the plaintiff appealed.

T. G. Coffin, in propria persona.

T. D. Eliot, for the defendant.

By Court, SHAW, C. J. This action is without precedent in this commonwealth, and contrary to the practice and course of decisions. The court have heretofore declined making interlocutory orders, requiring the husband to advance money, for the necessary expenses of the wife, in prosecuting or defending a suit for divorce, until the authority was vested in them by

statute of 1851, c. 82. Even in executing the authority granted by this act, the court have felt it their duty, as a general rule, to limit the allowance to a sum necessary to obtain evidence, and defray necessary expenses, other than counsel fees.

It has been decided in a case like the present, where a wife was the prevailing party on a libel for divorce filed by the husband, that she might have a judgment for costs, and an execution to recover them, notwithstanding her coverture: *Stevens v. Stevens*, 1 Met. 279. So in this case, she had or might have had a judgment for taxable costs, including attorney's fees, and all expenses except counsel fees, unless there is some good legal reason for withholding them.

In Vermont it has been decided that such action can not be maintained: *Wing v. Hurlburt*, 15 Vt. 607 [40 Am. Dec. 695].

In England, the practice of providing means for the wife, in a pending divorce, by or against her husband, has been managed by interlocutory orders, in the ecclesiastical courts, and a temporary taxation of costs, pending the suit, for taxable costs only: *Cheale v. Cheale*, 1 Hag. Ec. 374; *Wilson v. Wilson*, 2 Hag. Con. 203; *Davis v. Davis*, Id. 204, note.

The fact that no such action has ever been brought here is not conclusive; but it is evidence of a general understanding of what the law is.

Judgment for the defendant.

HUSBAND IS NOT LIABLE TO WIFE'S ATTORNEY IN DIVORCE SUIT brought by or against her: *Wing v. Hurlburt*, 40 Am. Dec. 695. The principal case is cited to the point that in Massachusetts it is not the practice to allow counsel fees to the wife pending a libel for divorce, in *Baldwin v. Baldwin*, 6 Gray, 342.

NELSON v. SUFFOLK INSURANCE COMPANY.

[8 CUSHING, 477.]

INSURERS INDEMNIFYING SHIP-OWNERS AGAINST PERILS OF SEA are bound to indemnify them for the amount they were obliged to pay the owners of another vessel for damages done the latter by a collision in consequence of the negligent navigation of the insured ship.

ASSUMPSIT on a policy of insurance, by which the defendants insured the plaintiffs ten thousand dollars upon their ship, the *Isaac Allerton*, for one year, from December 16, 1846, against the perils of the sea and the other customary perils. The policy provided that in case of loss or misfortune it should be lawful

for the insured, their factors, servants, or assigns, to sue, labor, and travel for, in, and about the defense, safeguard, and recovery of the ship, or any part thereof, without prejudice to the insurance, to the charges whereof the insurance company would contribute in a certain proportion. The case was submitted upon the following statement of facts: "The Isaac Allerton, being seaworthy and properly manned and equipped, sailed from New Orleans to Liverpool with a cargo of cotton and cobalt, under the protection of the policy, on the eighteenth of September, 1847; and during the voyage, on the tenth of November, 1847, about five o'clock in the morning, came in collision with a British steamer, called the Queen Victoria, in which both vessels suffered much damage. The ship subsequently arrived in Liverpool, and proceedings were commenced against her in the English court of admiralty in behalf of the owners of the steamer for damage done to her, and the vessel arrested, which was afterwards discharged on the owner's giving sufficient security. A libel was also instituted for damages, in behalf of the owners of the ship, against the steamer. Upon a hearing of the causes the court of admiralty ordered the libel against the steamer to be dismissed with costs for the respondents; and pronounced for damages and costs in favor of the owners of the steamer against the owners of the ship; which costs and damages, amounting to the sum of two thousand five hundred pounds, or thereabouts, the plaintiffs were obliged to pay. The defendants have paid their proportion of the expenses of repairing the damage suffered by the ship. The records of the proceedings in the court of admiralty are made a part of the case, and the court are to draw all just inferences of law and fact therefrom." If the court should be of the opinion that the plaintiffs are entitled to recover, the case shall be sent to an assessor, unless the parties agree upon the damages, and judgment entered for the amount due, with costs; otherwise the defendants are to recover costs.

F. C. Loring, for the plaintiffs.

B. R. Curtis, for the defendants.

By Court, FLETCHER, J. No question is made in regard to the declaration, but it is assumed that it contains all the material facts in the case; and the particular form of stating the facts can not affect the principles of law applicable to the case, or the decision of the court, which must be founded on these principles. The defendants having paid their proportion of the expenses of repairing the damage done to the plaintiffs' ship by

the collision, the plaintiffs claim, in this suit, the amount of damages and costs paid by them to the owners of the steamer, under the decree of the court of admiralty, together with the costs and expenses of defending the suit in that court, and the costs and expenses of prosecuting a cross-action for damages against the steamer and her owners.

By the agreement of the parties, all proper inferences from the facts stated are to drawn by the court; and from the fact that damages and costs were decreed by the court of admiralty in favor of the owners of the steamer against the owners of the ship, it must be inferred that there was negligence in the navigation of the plaintiffs' ship. But the decree itself is in the most general form; the judge "pronounced for the damage proceeded for in this cause," without stating the negligence or anything else as the ground of the decision, though negligence in navigating the plaintiffs' ship was alleged in the libel.

But it is the well-known law of the English courts of admiralty, upon the subject of collision, that where a vessel, which runs another down, is alone in fault, in such case, and in such case only, the injured party is entitled to entire compensation from the other. The plaintiffs having been compelled by the decree of the court of admiralty to pay the amount of damage done to the steamer, it must be assumed that the charge of negligence in the navigation of the plaintiffs' ship was established. The great prominent question in the case therefore is, whether the defendants, as insurers of the plaintiffs' ship, are bound to indemnify them for the amount they were obliged to pay the owners of the steamer for the damage done to the steamer by the collision, the collision having happened in consequence of the negligence in the navigation of the plaintiffs' ship.

This is certainly a deeply interesting question in a community so largely commercial as our own, and it is highly important that the decision of it should be such as to carry out and give effect to the intention of the parties, and accomplish the object designed to be accomplished by the useful and beneficent contract of insurance. It does not appear by any evidence in the case whether underwriters have or have not been accustomed heretofore to indemnify persons insured for payments which they have been obliged to make to the owners of other vessels for damage by collision. In the absence of all proof on the subject, conjectures would be useless. It is laid down as law by Emerigon, that in cases of collision, where it is impossible

to ascertain where the fault really lies, the aggregate damage being in such case equally divided between the two vessels, if the owner of the vessel insured is obliged to pay anything to the owner of the other vessel, the underwriters are responsible for such payment. Under the English law, where there is no blame imputable to either party in a collision, neither party is liable to the other for any damage, and of course, in such case, there can be no claim on underwriters for payment for damage to another vessel. The liability of underwriters for losses from perils insured against, where the perils happened in consequence of negligence in the navigation of the ship insured, has been established only by the modern decisions. Modern cases only can justly be expected to have arisen under the modern law. Under such circumstances, the idea that there can be any practical construction of the law in opposition to the plaintiffs' claim in this case must be wholly illusory.

New questions under all the various heads or branches of the law, including those most familiar and best understood, are constantly arising, and, as they arise, must be settled by the court by the application of just principles and analogies. The judicial decisions in England and the United States form a most material and important part of the law of insurance in its present improved state, as a well-defined, symmetrical system. Though a court may not always find in these decisions a precedent directly in point, yet it will rarely fail to find principles and analogies often quite as satisfactory to the judicial mind as a precedent. The contract of insurance is peculiar, relating to large and various interests, including numerous parties, and subject to the influence of various casualties. Such a contract must from its nature unavoidably give rise to many questions and controversies.

By this policy the defendants became the insurers for a certain amount on the plaintiffs' ship, and took upon themselves, among other things, the perils of the sea, and engaged to indemnify the plaintiffs for all losses sustained by them by the perils of the sea in the largest import of the terms. While the plaintiffs' ship was sailing under the protection of this policy, she came in collision with a British steamer, by which collision both the ship and the steamer were damaged. In addition to the cost of repairing their own ship, the plaintiffs have been compelled, by a decree of the court of admiralty in England, to pay, and have paid, to the owners of the steamer the amount of damage done to her by the collision. The defendants have paid

the expenses of repairing the plaintiffs' ship, and the plaintiffs seek in this suit principally to recover the amount paid by them to the owners of the steamer, which the defendants refuse to pay, alleging that that was not a loss by the perils of the sea, against which they insured. That collision whether occasioned by negligence or not is a peril of the sea, is perfectly well settled, and is not now questioned by the defendants, and they have paid the costs of repairing the damage done to the plaintiffs' ship by the collision.

The plaintiffs allege that the sum which they had to pay for damage to the steamer was a loss by a peril of the sea, that is, the collision; but this is denied by the defendants. We are thus led at once to inquire what losses come within the provision of the policy, as losses by the perils of the sea. In ascertaining the cause of a loss in question, in a case of insurance, courts are governed by the well-known maxim of the law, *In jure non remota causa sed proxima spectatur*. This is now the well-established rule, and is taken to be in accordance with the intention of the parties to the contract. The contract of insurance must be interpreted according to the true meaning and intention of the parties. This is the great governing principle of the interpretation of such contracts. Every stipulation in the policy is to be construed favorably to the party entitled to its benefit, as it must be presumed that he understood it in its most favorable sense, and that the other party intended he should so understand it. As the contract of insurance is a contract of indemnity to the assured, it is to be liberally construed in his favor. There can be no doubt that the assured intends to obtain the fullest and most ample indemnity, and that the insurer means that he shall understand that his policy affords him that indemnity. The policy therefore should be so construed as to fulfill these intentions. It is only by such construction that the contract of insurance can accomplish its useful and important purpose, and the commerce of the world be carried on.

When the plaintiffs in this case obtained insurance against losses by the perils of the sea, these terms were no doubt understood by them in their largest sense, as covering all losses justly attributable to those perils, and no doubt the defendants intended that they should thus understand and interpret their policy. To carry into effect these intentions, the policy must be construed favorably for the insured, to give them that security which they believed, and had a right to believe, they had ob-

tained. There should be no subtile reasoning, no shadowy distinctions, no straining of rules to narrow and restrict the operation of the contract so as to defeat the intention of the parties. The parties no doubt took a practical view of the matter, and had reference to all possible losses, known and unknown, which might be justly attributable to the perils of the sea in the broadest import of the words. They acted on no nice distinctions or subtile reasoning. They could not, of course, foresee and specify the losses, but could only use general terms. "The policy sweeps within its inclosure every peril incident to the voyage, however strange or unexpected, unless there be a special exception. The perils enumerated in the common policy are sufficiently comprehensive to embrace every species of risk to which ships and goods are exposed from the perils of the sea and all other causes incident to maritime adventure: 3 Kent's Com., 6th ed., 291.

The parties no doubt very well knew that there were many losses by the perils of the sea, other than the direct damage to the ship insured. To hold the defendants liable only for the direct damage to the ship insured would leave the plaintiffs exposed to ruin in various ways, without the protection they intended to obtain and supposed they had obtained under their policy. To give effect to the meaning and intention of the parties, therefore, the defendants must be held responsible for all losses justly attributable to the perils of the sea, as well as for the direct damage to the ship itself. Pothier, *Contrat d'Assurance*, sec. 49, says distinctly, that in his opinion the underwriters are liable not only for the injury done to the subject insured by the perils insured against, but to expenses and charges occasioned by those perils; as the expense of unloading the goods in case of a ship being wrecked by a storm. Mr. Justice Story, speaking for the supreme court of the United States, and referring to Pothier and other foreign writers, in *Peters v. Warren Ins. Co.*, 14 Pet. 112, says: "In short, all those learned foreigners hold the doctrine, that whenever the thing insured becomes by law directly chargeable with any expense, contribution, or loss, in consequence of a particular peril, the law treats that peril, for all practical purposes, as the proximate cause of such expense, contribution, or loss; and this they hold, not upon any peculiar provision of the French ordinance, but upon the general principles of law applicable to the contract of insurance. In our opinion, this is the just sense and true interpretation of the contract." The same learned judge, in *Hale v. Washington Ins.*

Co., 2 Story, 189, says: "Any and every expense borne by and chargeable upon the owner of the thing insured, as a direct and immediate consequence of a peril insured against, is covered by the policy."

This principle is clearly illustrated by the liability of underwriters for a general average loss. A ship is insured against the perils of the sea, a part of the cargo is thrown overboard by reason of a peril of the sea, and the ship and owner become at once chargeable for a proportion of this loss of the cargo, and the underwriter is held bound by the policy to indemnify the owner of the ship for the sum he has to pay to make up the loss of the cargo. Here is no damage to the ship insured, but the sum thus charged upon the owner and ship, for the cargo, is held to be a loss by the perils of the sea, for which the underwriter is responsible.

So in case of insurance against capture, the underwriter is liable not only for any damage the ship may have actually sustained by a capture, but also for all necessary expenses, such as salvage, etc., which the assured has been put to for the recovery of his property. Thus it has been determined that the underwriter is liable for a sum of money paid by the neutral assured to belligerent captors as a compromise, made *bona fide*, to prevent the ship being condemned as prize: 2 Arn. Ins. 809, 810. So the liability of underwriters for salvage expenses depends not upon their having engaged to indemnify against them by any express words in the policy, but upon their being made by the law of the land, or the general law maritime, a direct and immediate consequence of perils against which they do insure: 2 Arn. Ins. 846, 847. Reference might be made to many other charges, expenses, and losses, distinct from the thing insured, and not mentioned by any express words in the policy, for which the underwriter is liable, but they all depend on the general principle, that where the thing insured becomes by law directly chargeable with any expense, contribution, or loss, in consequence of a particular peril, the law treats such peril, for all practical purposes, as the proximate cause of such expense, contribution, or loss.

Upon any other principle, policies of insurance, instead of being a protection, would serve but to allure men to their ruin. Upon this principle, the liability of the defendants for the sum claimed in this suit would seem to be too clear for controversy. To hold that the defendants are not liable in this case would conflict directly with the doctrine held in the analogous cases,

which have been referred to, and thus introduce inconsistency into the law, where consistency and uniformity are most essential.

The plaintiffs' ship, insured by the defendants, came in collision with the British steamer, by which collision the steamer was damaged and *eo instanti* the plaintiffs and their ship became chargeable by law with the amount of the damage done to the steamer; this damage the plaintiffs have been obliged to pay, and have paid and lost, and this loss they now claim under their policy. It was surely the collision which brought the loss on the plaintiffs, the collision did the damage, and that act instantly fastened the loss on the plaintiffs, so that the plaintiffs' loss was the direct and immediate consequence of the collision, which was a peril insured against and for which the defendants are liable.

The defendants admit that they are liable for damage done to the plaintiffs' ship by the collision; but the same collision which damaged the plaintiffs' ship damaged also the steamer, and the loss of the damage of the ship and the damage of the steamer fell on the plaintiffs in one mass, at the same time and from the same cause. The same peril, the collision, took out of the plaintiffs' pocket, at the same time, the amount of the damage to the ship and the damage to the steamer, as one entire result or consequence. It was precisely the same to the plaintiffs as if the whole damage had been done to their own ship. To separate this aggregate result of the same peril, acting at the same time, and under precisely the same circumstances, into parts, and hold the defendants answerable for one part, and not for another part, requires a course of reasoning quite too subtle and metaphysical to be useful or safe in dealing with a practical matter like insurance. The parties to the contract can hardly be supposed to have intended to make such a paradoxical distinction. Some examination of the positions maintained in the argument in behalf of the defendants will more fully exhibit the grounds of defense.

It is said that a policy on a vessel insures that particular vessel; that in fixing the amount of premium, etc., the underwriter is materially influenced by the age, size, and strength of the vessel which is the subject of the policy, and of these he has the means of knowledge, and acts upon that knowledge; but that a claim like that made by the plaintiffs introduces into the contract another vessel, about which the insurer had no means of obtaining any knowledge, but which he is nevertheless to stand

as insurer of, against the peril of collision from negligence. This is a fanciful rather than a just view of the subject. It might as well be said that to hold the underwriter on a vessel liable for the loss of cargo by jetsam was to make him an insurer of the cargo without his knowledge or consent.

A considerable portion of the argument for the defendants assumes that the plaintiffs rely on the fact that there is a lien *in rem* for damage by collision as the foundation of their claim. This portion of the argument it is not necessary to consider, as the plaintiffs in fact contend that their claim would be equally good if no remedy *in rem* existed. The owners of the steamer might proceed against the ship or her owners at their pleasure, and it is wholly immaterial as to the liability of the underwriters which form of remedy might be adopted. In either way the plaintiffs' loss is the same, and their claim on the underwriters the same. The fact that a lien was created by the collision, and thus reduced the value of the vessel insured, was used to illustrate and enforce the plaintiffs' claim under their policy. The extent of the liability, which, it is said, would be imposed on underwriters if the plaintiffs' claim is sustained, is also insisted on in the argument. Such a consideration can not change the law. Besides, the liability of the underwriter can not of course be extended beyond the sum insured.

The main ground of defense, however, relied on in the argument is, that there was negligence in the navigation of the plaintiffs' ship; that without this negligence the plaintiffs would not have been obliged to pay for the damage done to the steamer; and therefore, that so far as respects the payment for damage to the steamer, the negligence was the proximate cause of the loss, and not the collision. Properly to estimate the force and value of this argument, it is necessary to inquire who, in case of a loss arising from one of the perils insured against, is responsible for the conduct of the master or mariner in the practical navigation of the vessel.

It seems to have been formerly held that underwriters were not responsible for losses which happened in consequence of the negligence of the master or crew in the navigation of the ship. This doctrine would go far to deprive the assured of the benefit and protection of his policy, without any fault of his own, and would greatly lessen, if it did not destroy, the usefulness of insurance. Some fault or negligence on the part of the master or mariners enters into almost every case of a loss or damage of a vessel at sea. The danger from such fault or neg-

ligence is one of the dangers which the assured has most reason to apprehend, and against which he most needs and may reasonably expect protection.

Besides, such a doctrine would be sure to involve the assured in perpetual controversies and litigation, in regard to the fact of negligence, whether there was or was not negligence, and what was the degree of the negligence, if any, and whether the loss was or was not in consequence of such negligence. These would be difficult and perplexing questions of fact, the decision of which would depend on many contingencies; thus involving the rights of the assured in ruinous doubts and uncertainties. To avoid such evils and to give effect to the true meaning and intention of the parties, the modern decisions have established a different rule, and one much more in consonance with the principles and purposes of the contract of insurance. The great principle now well established is, that if the vessel, the master, officers, crew, and equipments are competent and sufficient at the commencement of the voyage, the assured has done all that he contracted to do; he did not guarantee the faithfulness and vigilance of the master and crew, and he is not responsible for their negligence; but for the conduct of the master and mariners, in the practical navigation and management of the vessel, after the commencement of the voyage, the insurers are responsible, provided the actual loss arise from one of the perils insured against, though such peril may have occurred in consequence of the negligence or carelessness of the master and crew.

This rule of law is now perfectly well established, by the decisions in England, by the decisions of the supreme court of the United States, and by the courts of several of the states, and has been adopted by this court, in conformity with the decisions of the supreme court of the United States, that the decisions involving so important a practical principle might be uniform throughout the United States, and in conformity with the rule established in England: *Busk v. Royal Exchange Assurance Co.*, 2 Barn. & Ald. 73; *Walker v. Maitland*, 5 Id. 171; *Phillips v. Headlam*, 2 Barn. & Adol. 380; *Dixon v. Sadler*, 5 Mee. & W. 405; *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222; *Columbia Ins. Co. v. Lawrence*, 10 Id. 507; *Waters v. Merchants' Louisville Insurance Co.*, 11 Id. 213; *Copeland v. New England Marine Insurance Co.*, 2 Met. 432; *Perrin v. Protection Ins. Co.*, 11 Ohio, 147 [38 Am. Dec. 728]; *Henderson v. Western M. & F. Ins. Co.*, 10 Rob. (La.) 164 [43 Am. Dec. 176].

This doctrine does not rest on any principle of estoppel, that

The defendants can not go behind the peril to show the negligence, but that, under the circumstances stated, the underwriters are responsible for the negligence of the master and crew; and it is perfectly immaterial whether the fact of negligence is shown by the defendants, or is expressly set out and shown by the plaintiff as a part of his case; the principle remains the same, and the responsibility of the underwriters remains the same, by whichever party or in whatever form the fact of negligence is introduced into the case. When a peril insured against actually happens, all the negligence connected with it is at the risk of the underwriters, and all the consequences of the negligence fall upon them.

In the argument for the defendants, it is attempted to place the payment of the damage done to the steamer upon a different and distinct ground from the damage to the ship insured. It is not perceived that the use of the word "tort," instead of "negligence," adds anything to its force. It is said that the damage to the ship insured was the direct consequence of the collision by itself, and that the collision, therefore, is the proximate cause of that damage; but that the plaintiffs would not have been obliged to pay the damage to the steamer if there had not been negligence, and that that makes a difference. That is, that the plaintiffs would not have been liable to pay the damage to the steamer if there had not been negligence, and that therefore the negligence is the proximate cause of the payment. Showing that negligence forms a necessary ingredient in the case falls very far short of showing that it is the proximate cause of the loss. If it follows from the fact that the plaintiffs would not have been held to pay if there had not been negligence, that the negligence is the proximate cause of the payment, it may be shown in precisely the same way that the collision was the proximate cause. If there had not been a collision, the plaintiffs would not have been liable to pay, and therefore the proximate cause of the payment is the collision. Yet the whole stress of the argument, to show that the negligence was the proximate cause of this loss rests on the proposition, that if there had not been negligence, the plaintiffs would not have been liable for the damage. Because the negligence was a necessary element in the case, it is attempted to set up the negligence as a distinct, substantive, proximate cause of the loss, putting the collision altogether out of sight, as quite unimportant.

To test the strength of the argument, it may be drawn out and stated more fully in the following general form: If the peril

of the sea which operated in a given case was not of itself sufficient to occasion, and did not in and by itself occasion, the loss claimed, if it depended upon the cause of that peril whether the loss claimed would follow it, and therefore a particular cause of the peril is essential to be shown by the assured, then we must look beyond the peril to its cause, to ascertain the efficient cause of the loss. It is believed that the above form of stating the argument sets out its full force and scope. A little change of the phraseology of the argument, so as to apply it to the present case, but without affecting at all its force, will show its entire fallacy. Thus, if the negligence in this case was not of itself sufficient to occasion, and did not in and by itself occasion, the loss claimed, if it depended upon the consequence of the negligence, that is, the collision, whether the loss claimed would follow it, and therefore a particular consequence of the negligence is essential to be shown by the assured, then we must look beyond the negligence to its consequence, the collision, to ascertain the efficient cause of the loss. This mode of reasoning, in whatever form it may be put, must prove, if it prove anything, that there are two proximate causes; because there must always be both negligence and a collision; neither, in the absence of the other, would occasion the loss. This proves too much to be sound reasoning. Besides, this mode of reasoning directly begs the question. It assumes, at the outset, that the collision does not occasion the loss, and then jumps to the conclusion that because the collision does not occasion the loss, the negligence does.

But the true practical view of the subject, free from over-refinement and subtilty, is very clear and intelligible. By the admiralty law, the owner of a vessel may or may not be liable for damage done by his vessel by a collision, according to the circumstances under which the collision takes place. If the collision happen in the absence of negligence, then the owner is not liable; if it happen under circumstances of negligence, or by reason of negligence, then he is liable—liable for the collision and damage done by the collision, as the proximate cause. The negligence is an element in the case, but not the proximate cause of the loss. The negligence must of necessity be more remote than the collision; the collision follows as the consequence of the negligence; and the payment for the damage to the other vessel follows as the consequence of the collision, as its proximate cause. The payment is attached to the damage by the collision, and is commensurate with that damage; it is not

attached to the negligence, nor is it measured by the negligence. The negligence can not be set up as a distinct, substantive, proximate cause of the payment, upon any other ground than that the payment was a penalty for the negligence; and if so, the penalty should be measured by the negligence, and exacted even though there should be no damage from the collision. But surely there was no penalty to be measured by the negligence, but the payment of the actual, carefully ascertained damage caused by the collision, which is of course the proximate cause of the payment.

There are cases which proceed upon the ground, that the loss happened wholly from negligence, in the absence of any peril insured against, in which cases the underwriters, of course, are not held responsible. Such was the case of *Hazard v. N. E. Marine Ins. Co.*, 1 Sumn. 218, where the loss was held to be from negligence, without any peril within the policy. There are other similar cases. It seems designed by the argument for the defendants, to place the present case on the same ground with those cases where the underwriters have been held not to be answerable for the loss, for the reason that it happened from negligence, without any peril within the policy. But this case does not come within that class. Here was clearly a peril insured against; and although there was negligence, yet, as the law now stands, the underwriters take the risk of such negligence, and are answerable for the consequences of the peril as the proximate cause of the loss, notwithstanding the negligence, and that liability for negligence extends to the payment for damage to the steamer, as well as to the direct damage to the ship; upon perfectly well-established principles, therefore, it seems plain that the underwriters are responsible for the loss claimed in this case.

But we are referred by the argument for the defendants to certain approved writers on maritime law abroad, who hold, it is said, an opposite doctrine. We have made some examination of those authors.

In France, it has been long well established; that underwriters are not liable for any loss arising from the misconduct or negligence of the master or crew of the vessel insured, and of course are not liable for any injury done by a collision occasioned by the fault of the master or crew of the ship insured: Pothier, *Contrat d'Assurance*, sec. 50; Emerigon, c. 12, sec. 14; Boucher, *Droit Mar.*, 1501, 1502; Code de Com., sec. 213; 3 Pardessus, *Droit Com.*, sec. 772.

This is directly opposed to both the English and American law, as now held. But even in France, by special provision in the policy, the underwriters may assume the risk of the fraudulent misconduct or negligence of the master and crew, the stipulation not being illegal: Pothier, *Contrat d'Assurance*, sec. 65; *Code de Com.*, sec. 213. The French law, then, makes no difference between injuries done by a collision to the ship insured, owing to the negligence of the master or crew, and injuries done to the other ship. The underwriter can not, under the common policy, be made to pay for either. But in case of a policy in France, so expressed as to protect against the consequences of the negligence of the master and men, I presume the underwriters would be held to pay in a case of collision, not only the expense of repairing the ship insured, but whatever sum her owners had to pay to the owners of the other vessel for damage done by the collision. I come to this conclusion from the consideration that the French law does not limit the liability of the underwriters to paying for damage to the ship insured, but extends it to the injury done to another vessel by collision. In such case, when it is impossible to ascertain where the fault really lies, the loss being equally divided between the two vessels, if the owner of the ship insured has, in this partition, to pay anything to the owners of the other vessel, the underwriters are required to pay the owners of the vessel insured, not the expenses of repairing her merely, but whatever sum, in addition, the owner is required to pay toward repairing the other vessel: Emerigon, c. 12, sec. 14; 4 Boulay Paty, *Droit Mar.*, ed. 1823, 16.

In France, then, the principle is established, that an underwriter may have to pay for repairing an injury to a subject which he does not insure, in a case where the expense becomes a charge on the subject insured and its owner, arising out of a peril insured against. Indeed, this is no more than the long-established principle of general average, where the underwriter has to pay for a portion of the damage to a subject not insured, on the same ground that it is a charge on the subject insured and its owner, arising out of a peril covered by the policy.

So far as the argument for the defendants derives any support from the French law, that law is in direct conflict with our own, and can not therefore have any force in this case.

But there are some adjudged cases which have a bearing on the present case, and must now be considered.

The case of *De Vaux v. Salvador*, 4 Ad. & El. 420, appears to have been a case of fault on both sides; each ship was damaged,

and each ship had to bear half of the aggregate loss. In the settlement, the ship insured had to pay a balance to the other ship, and that suit was brought to recover of the underwriter the sum thus paid, and it was held that the underwriter was not liable. Though that was a case of negligence, no such position in regard to negligence was taken as is taken in this case. The case was very summarily disposed of by the court as a new case, with very little reference to principles. It was said that the payment was made under the rule of the court of admiralty; that it grew out "of an arbitrary provision in the law of nations, from views of general expediency, not as dictated by natural justice, nor (possibly) quite consistent with it." It is difficult to see how a rule, that in case of mutual fault, where it is impossible to measure accurately the effect of the fault of each party, the whole loss shall be borne equally by them, can be said to be inconsistent with natural justice. It was no doubt intended to be a just and equitable rule, and it would not be easy to prescribe a better or more equitable one. This payment was then compared to a penalty incurred by the contravention of the revenue laws of any particular state, rendered inevitable by perils insured against.

The case supposed is quite too uncertain in itself, and quite too unlike the case in hand to throw any light upon it. But this is in substance the whole explanation given of the decision, so far as relates to the question now under consideration. It is not necessary further to examine that case, as we consider its authority substantially overcome by the decision of the supreme court of the United States, in the case of *Peters v. Warren Ins. Co.*, 14 Pet. 99. That was a case where the plaintiffs' vessel came in collision with another vessel wholly by accident, and without any fault on either side; both vessels suffered damage, and by the marine law of Hamburg, to which the vessels were subject, each vessel had to bear one half of the whole aggregate loss of both vessels. Under that law, the plaintiffs had to pay an amount to the owners of the other vessel, they being the greatest sufferers, and that action was brought to recover the amount so paid of the underwriters on the plaintiffs' vessel, and it was decided that the plaintiffs were entitled to recover the sum claimed. The case was fully argued, and a thorough and elaborate opinion delivered by the court. The decision did not depend at all on the fact that there was no fault or negligence on either side, but was placed upon much broader ground. The whole argument of the court went to show that a claim for

a payment made to another vessel for damage done by collision stood upon precisely the same ground as a claim for damages done directly to the vessel insured. The strong and conclusive reasoning of the court went to maintain the general proposition, that the collision was, upon general principles, and in all cases where the insured became liable to pay for damage done to another vessel, as much the proximate cause of such payments as of the immediate damage to the ship insured.

That that decision was intended to include, and does include, a case like the present, in which there is negligence in the navigation, is perfectly manifest. That the court did not consider that the fact, that the owner was obliged to make the payment by reason of there having been negligence in the navigation of his ship, would take a case out of the operation of their decision, is made certain by the fact that they refer to the case of *De Vaux v. Salvador*, 4 Ad. & El. 420, which was a case of negligence, as in direct conflict with their own decision. If a case in which there was negligence did not come within the scope of the decision in *Peters v. Warren Ins. Co.*, 14 Pet. 99, then the court in that case would, no doubt, have treated the case of *De Vaux v. Salvador*, *supra*, which was a case of negligence, as not in conflict with their decision, but as distinguished from the case before them, and standing on different ground. But there is no intimation that the two decisions can be reconciled; that they stand upon different principles; that the negligence in the case of *De Vaux v. Salvador*, *supra*, distinguished it from the case of *Peters v. Warren Ins. Co.*, *supra*, in which there was no negligence; but the two cases are treated as in conflict, and the court dissent entirely from the decision in *De Vaux v. Salvador*, *supra*, as "in opposition to the analogies furnished by other acknowledged doctrines in the law of insurance." But to put this matter beyond all controversy, Mr. Justice Story, in the case of *Hale v. Washington Ins. Co.*, 2 Story, 176, expressly refers to the case of *Peters v. Warren Ins. Co.*, *supra*, as a case in point in support of a claim for a payment to which the party had been subjected by reason of negligence in the navigation of his ship. To hold now that the case of *Peters v. Warren Ins. Co.*, *supra*, is not a case in point to support a claim like the present, to recover the amount which the plaintiffs were compelled to pay for damage by collision which happened in consequence of the negligence of the master and crew in the navigation of his ship, would be a direct renunciation of the principle upon which the decision in that case was founded, and would be in fact saying

that Mr. Justice Story did not correctly comprehend the scope of his own opinion, and that that case does not mean what he supposed it meant. Such a position must be wholly untenable.

The case of *Hale v. Washington Ins. Co.*, 2 Story, 176, already referred to, is also directly in point in support of the plaintiffs' claim. In that case, the plaintiff sought to recover of the underwriters on his ship the amount he had been compelled to pay, under the rule in admiralty, for damage done to another vessel by a collision occasioned by the fault or mistake of the mate and crew of his own ship, and it was adjudged that he was entitled to recover the sum claimed. That case is like the present in all its material facts, and supports with all its weight the plaintiffs' claim. The same learned counsel appeared for the defendants in that case who appears for the defendants in this case, and endeavored, in that case as in this, to show that the negligence, and not the collision, was the proximate cause of the loss; but the argument failed to convince the court. He endeavored also to distinguish the case of *Peters v. Warren Ins. Co.*, *supra*, from the case then in hearing, as he has endeavored to distinguish it from this case; but the distinction was not admitted by the court. That case was thoroughly examined by the court, and an elaborate opinion was delivered, the reasoning of which commands the entire assent of this court; and the great learning and high judicial character of the judge, his familiarity with the law of insurance, and his large judicial experience in administering that law, give to his decision great weight and authority.

The present case, therefore, has in its support both the cases of *Peters v. Warren Ins. Co.*, *supra*, and *Hale v. Washington Ins. Co.*, *supra*, and this court sees no reason to disturb the law as settled by those decisions.

The circuit court of the United States for the southern district of New York, in a recent case, have followed these decisions: *Sherwood v. General Mut. Ins. Co.*, 1 Blatchf. 251; so that all the decisions upon this subject in this country are the same way. See also *Mathews v. Howard Ins. Co.*, 13 Barb. 234.

In our judgment, both upon principle and authority, the proximate cause of the loss which the plaintiffs sustained by being obliged to pay the amount of damage done to the steamer, was the collision; and this was a peril against which the defendants insured, and for which they are responsible.

Unless the parties agree on the amount for which judgment shall be entered, the case will be sent to an assessor.

After this opinion was announced, judgment was entered by consent for the plaintiffs for the whole amount claimed.

POLICIES OF INSURANCE, HOW CONSTRICTED: *Bradley v. Nashville Ins. Co.*, 48 Am. Dec. 465, and prior cases in note.

PERILS OF SEA, WHAT ARE—COLLISIONS: See note to *Van Hern v. Taylor*, 41 Am. Dec. 281, where the subject is fully discussed.

PROXIMATE CAUSE OF LOSS, UNDERWRITER'S LIABILITY FOR: See *Natches Ins. Co. v. Stanton*, 41 Am. Dec. 592; *McCargo v. New Orleans Ins. Co.*, 43 Id. 180; *Hillier v. Allegheny etc. Ins. Co.*, 45 Id. 656, and note; but the last is not necessarily the proximate cause: *McCargo v. New Orleans Ins. Co.*, *supra*. The principal case was cited in *Marble v. City of Worcester*, 4 Gray, 409, *per* Thomas, J., dissenting, in considering the question of proximate cause, to the point that the maxim, *In jure causa proxima, non remota spectatur*, is a maxim applied in practice almost exclusively to the law of marine insurance, and by no means of universal application there; see also the principal case cited in *Emery v. Huntington*, 109 Mass. 437, in a suit by the owners of a vessel against the owners of her cargo for contribution, where she had incurred damages caused by colliding with another vessel, to the point that the real and legal cause of the liability to pay such damages and expenses was the meeting of the two vessels in collision.

NEGLIGENCE AS DEFENSE TO POLICY OF INSURANCE: See *American Ins. Co. v. Insley*, 47 Am. Dec. 509; note to *Hillier v. Allegheny etc. Ins. Co.*, 45 Id. 660; *Henderson v. Western etc. Ins. Co.*, 43 Id. 176; *Natches Ins. Co. v. Stanton*, 41 Id. 592; *St. Louis Ins. Co. v. Glasgow*, 41 Id. 661, and prior cases in note. The principal case was cited in *Parkhurst v. Gloucester etc. Ins. Co.*, 100 Mass. 305, to the point that the general tendency of modern decisions is not to hold the owner of a vessel, who has complied with the warranty of seaworthiness in a policy of insurance, responsible for the negligence of the master and crew upon the voyage.

UNDERWRITER'S LIABILITY FOR INJURIES CAUSED ANOTHER VESSEL, THROUGH COLLISION WITH INSURED VESSEL, AND FOR WHICH LATTER HAS BEEN OBLIGED TO PAY.—The first case in which this question arose seems to be that of *De Vaux v. Salvador*, 4 Ad. & El. 420, considered in the principal case, and in which the facts were as follows: The ship *La Valeur* collided in the Hoogly river with the steamer *Forbes*, and both vessels suffered considerable damage. The owner of the *Forbes* claimed a compensation from the *La Valeur*, and threatened to detain her and proceed in the court of admiralty at Calcutta; and upon the claim being referred to arbitration, it was awarded that each vessel should bear half the joint expenses of the two; and as a consequence, the *La Valeur*, upon the settlement, had to pay a balance to the *Forbes*. It was held that this was not a loss for which the underwriters were liable. Lord Denman said: "The ship insured is driven against another by stress of weather; the injury she thus sustains is admitted to be direct, and the insurers are liable for it. But the collision causes the ship insured to do some damage to the other vessel; and whenever this effect is produced, both vessels being in fault, a positive rule of the court of admiralty requires the damage done to both ships to be added together, and the combined amount to be equally divided between the owners of the two. It turns out that the ship insured has done more damage than she has received, and is obliged to pay the owners of the other ship to some amount, under the rule of the court of admiralty. But this is neither a necessary nor a proximate effect of the

perils of the sea; it grows out of an arbitrary provision in the law of nations, from views of general expediency, not as dictated by natural justice, nor (possibly) quite consistent with it; and can no more be charged on the underwriters than a penalty incurred by contravention of the revenue laws of any particular state, which was rendered inevitable by perils insured against." Two years afterwards the case of *Peters v. Warren Ins. Co.*, 3 Sumn. 389, arose, and was decided by Mr. Justice Story. The ship *Paragon*, insured in a certain amount by the defendants against the perils of the sea, while proceeding down the Elbe collided with a galiot and sunk her, and also suffered some damage herself. The *Paragon* was libeled in the marine court of Hamburg; but the court decided that the collision was not the result of fault or carelessness on either side, and therefore, by the marine law of Hamburg, the loss was borne equally. It was held that the contributory amount which the *Paragon* was obliged to pay to the owners of the galiot on account of the collision was a direct, positive, and proximate effect of the accident in such sense as to render the defendants liable therefor upon the policy. This decision was unanimously affirmed by the supreme court of the United States in *Peters v. Warren Ins. Co.*, 14 Pet. 99. The next case in point of time was *Hale v. Washington Ins. Co.*, 2 Story, 176. The ship *Columbia*, in sailing down St. George's channel, by the fault or mistake of her mate and crew, came in collision with the English bark *Ritchie*, by which both vessels sustained damage. The master of the *Columbia*, to prevent a proceeding in rem in the English high court of admiralty, paid the owners of the *Ritchie* a certain sum, by way of compromise for the damage sustained by the latter vessel. Mr. Justice Story again held that the underwriters on the *Columbia* were liable for the sum so paid; the amount paid for the collision was a loss occurring to the owner from the peril insured against; and the collision was the proximate cause of the loss. Mr. Justice Story, in this series of American cases, dissented from the position, as taken in *De Vaux v. Salvador*, *supra*.

In *Sherwood v. General Mutual Ins. Co.*, 1 Blatchf. 251, where the brig *Emily*, insured by the defendants against perils of the sea, through negligence and misconduct in her management and navigation, collided with the schooner *Virginian*, by which the latter was sunk, and with her cargo totally lost, and for which damages were recovered against the *Emily*, it was held, on the authority of *Peters v. Warren Ins. Co.*, 14 Pet. 99, that a policy of insurance against perils of the sea comprehends the damages paid by the insured vessel to the other in consequence of the collision. This case was reversed in *General Mutual Ins. Co. v. Sherwood*, 14 How. 351, Mr. Justice Curtis, who had been of counsel for the defendants in *Hale v. Washington Ins. Co.*, 2 Story, 176, and in the principal case, saying: "The argument is, that collision, being a peril of the sea, the negligence which caused that peril to occur is not to be inquired into; it lies behind the peril and is too remote. This is true when the loss was inflicted by collision, or was by law a necessary consequence of it. The underwriter can not set up the negligence of the servants of the assured as a defense. But in this case he does not seek to go behind the cause of loss, and defend himself by showing this cause was produced by negligence. The insured himself goes behind the collision, and shows, as the sole reason why he has paid the money, that the negligence of his servants compelled him to pay it. It is true that an expense attached by the law maritime to the subject insured, solely as a consequence of a peril, may be considered as proximately caused by that peril. But where the expense is attached to the vessel insured, not solely in consequence of a peril, but in consequence of the misconduct of the servants of the assured, the

peril *per se* is not the efficient cause of the loss, and can not in any just sense be considered its proximate cause. In such a case the real cause is the negligence, and unless the policy can be so interpreted as to insure against all losses directly referable to the negligence of the master and mariners, such a loss is not covered by the policy. We are of the opinion the policy can not be so construed. Where a peril of the sea is the proximate cause of the loss, the negligence which caused that peril is not inquired into; not because the underwriter has taken upon himself all risks arising from negligence, but because he has assumed to indemnify the insured against losses from particular perils, and the assured has not warranted that his servants will use due care to avoid them. * * * So far as the brig Emily was herself injured by the collision, the cause of the loss was the collision, which was a peril insured against, and the assured, showing that his vessel suffered damage from that cause, makes a case and is entitled to recover. But he claims to recover, not only for the damages done to his vessel, which was insured, but for damages done to the other vessel not insured. To entitle himself to recover these, he must show not only that they were suffered by a peril of the sea, but that the underwriter is responsible for the consequences of that peril falling on a vessel not insured. It is this responsibility which is the sole basis of his claim, and to make out this responsibility he does not and can not rest upon the occurrence of a collision; this affords no ground for this claim; he must show a particular cause for that collision, and aver that by reason of the existence of that cause, the loss was suffered by him, and so the underwriter became responsible for it. This negligence is therefore the fact without which the loss would not have been suffered by the plaintiff, and by its operation the loss is suffered by him. In its strictest sense it causes the loss to the plaintiff. The loss of the owners of the Virginian was occasioned by a peril of the sea by which the vessel was injured. But nothing connects the plaintiff with that loss, or makes it his, except the negligence of his servants. Of his loss this negligence is the only efficient cause, and in the sense of the law it is the proximate cause. * * * It has been urged that in the case of the Paragon, *Peters v. Warren Ins. Co.*, 14 Pet. 99, this court adopted a rule which, if applied to the case at bar, would entitle the insured to recover. But we do not so consider it. It was there determined that a collision without fault was the proximate cause of that loss. Indeed, unless the operation of law, which fixed the lien, could be regarded as the cause of that loss, there was no cause but the collision, and that was the peril insured against. We are aware that in the case of *Hale v. Washington Ins. Co.*, 2 Story, Mr. Justice Story took a different view of this question, and we are informed that the supreme court of Massachusetts has recently decided a case [the principal case] in conformity with his opinion, which is not yet in print, and which we have not been able to see. But with great respect for that eminent judge, and for that learned and able court, we think the rule we adopt is more in conformity with sound principle as well as with the practical interpretation of the contract by underwriters and merchants, and that it is the safer and more expedient rule."

The case of *Mathews v. Howard Ins. Co.*, 13 Barb. 234, where a steam propeller, navigating the St. Lawrence river and the great lakes, was insured by the defendants against the perils of the lakes, rivers, canals, etc., collided, through the negligence of her master and crew, with a bark, and injured the latter, followed *Peters v. Warren Ins. Co.*, 14 Pet. 99, and *Hale v. Washington Ins. Co.*, 2 Story, 176, and held the defendants liable for the amount which the propeller paid or became liable to pay for the injuries to the bark;

but pending the appeal of this case, *General Mutual Ins. Co. v. Sherwood*, 14 How. 351, was decided, and it was seen fit to reverse the ruling of the lower court in *Mathews v. Howard Ins. Co.*, 11 N. Y. 9. In *Street v. Augusta Ins. etc. Co.*, 12 Rich. 13, it was also held that insurers are not liable for the damages which the owners of the vessel insured were compelled to pay to another vessel, with which the former collides through the negligence of the master and crew of the insured vessel, the court saying that *General Mutual Ins. Co. v. Sherwood*, *supra*, "takes from *Nelson v. The Suffolk Ins. Co.* the only authorities on which it rests." Mr. Phillips, in his work on insurance, disapproves of the rule as laid down by *Peters v. Warren Ins. Co.*, 3 Sumn. 389; S. C., 14 Pet. 99; *Hale v. Washington Ins. Co.*, 2 Story, 176, and cases following them, approves *General Mutual Ins. Co. v. Sherwood*, 14 How. 351, and thus states the doctrine, section 1137 a: "The underwriters on a vessel are not liable, under insurance against perils of the sea, to indemnify the insured owner for the amount he has been liable to pay to the owners of another vessel on account of damage to the latter by collision through the fault of the master or mariners of either or both of the vessels, or without fault on either side;" and in 1 Pars. on Mar. Ins. 554, a similar view is taken by Mr. Parsons, who was of counsel for the defendants in *Peters v. Warren Ins. Co.*, 14 Pet. 99. However, be these decisions as they may, the courts of Massachusetts refuse to recede from the position taken by them in the principal case; and its doctrine was approved in *Walker v. Boston & Hope Ins. Co.*, 14 Gray, 288, 293, as the "well-established law of this commonwealth;" and in *Blanchard v. Equitable Safety Ins. Co.*, 12 Allen, 386, 388, and *Thwing v. Great Western Ins. Co.*, 111 Mass. 93, 108, the court declined to reconsider the question there regarded by it as settled. Of course a policy of insurance may provide that the underwriters shall be liable for injuries to another vessel through collision: See *Thompson v. Reynolds*, 7 El. & Bl. 172, in which case, however, Lord Campell said: "It is clear that the underwriters are liable only by virtue of the special clause."

NEWHALL v. IRESON.

[8 CUSHING, 595.]

BOUNDARY OF LAND IS PRESUMED TO BE MIDDLE OF HIGHWAY, when described in the deed as running northerly a certain distance to the highway, and thence upon the highway; and the fact that the distance when measured carries the line only to the southerly side of the highway, does not rebut the presumption.

RIPARIAN PROPRIETOR SUBSTANTIALLY DIVERTING WATERCOURSE, by so doing encroaches on the rights of a proprietor below, who may maintain an action for the diversion, although he sustains no present damage thereby.

LEGISLATIVE ACT AUTHORIZING CONSTRUCTION BY RIPARIAN PROPRIETOR of a pipe or culvert to convey a watercourse along and across a highway does not affect the rights of a proprietor below to maintain an action for diversion thereby.

ACTION on the case to recover damages caused by the diversion of a portion of the water of a natural watercourse. The

case was submitted to the court on a statement of facts substantially as follows: The watercourse crosses the highway from the north, opposite the plaintiff's land, runs thence several rods on the south side of the highway, between the traveled part and the wall of the land, and then turns south and runs between the plaintiff's land on the east and the defendants' land on the west, into a creek. On this land west of the plaintiff's the defendants have erected a mill or factory; and on another piece of land, through which the watercourse flows, on the north side of the highway, above the plaintiff's land, and east of the place where the watercourse crosses the highway, they have made an excavation and formed a pond, for the use of their mill, and built a dam. The defendants, by authority of an act of the legislature, constructed a pipe or culvert from their pond along and across the highway, to their mill, and conformed to the requirements of the act, so far as the size of the pipe and manner of placing it in the ground were concerned; and they have occasionally drawn water through the pipe, but at no time in such quantity as to prevent its accustomed use by the plaintiff. The northern boundary of the plaintiff's land is described, in a deed under which she claims title, as "running northerly seven poles to the county road, and from thence upon the road twenty-two poles to the first-mentioned bound." The seven rods terminate at the old wall formerly constituting the southern boundary of the road, and the watercourse is north of this wall and within the southern half of the highway. The plaintiff claims only nominal damages.

T. B. Newhall, for the plaintiff.

J. C. Stickney, for the defendants.

By Court, SHAW, C. J. Two questions are presented in this case. The first is whether the plaintiff has title to the half of the highway, along which the stream in controversy runs; if she has, it being conceded that the brook lies wholly south of the middle of the highway at that place, it must of course, for some extent, pass wholly through the land of the plaintiff.

The northern boundary of the plaintiff's land is described, in a deed from which she derives her title, as "running northerly seven poles to the county road, and from thence upon the road twenty-two poles to the first-mentioned bound." The ordinary construction of such a deed, to the highway and from thence upon the highway, would carry the land to the middle of the

highway. Such is the established presumption, governing the construction of a deed, in the absence of controlling words: *Chatham v. Brainerd*, 11 Conn. 60; *Champlin v. Pendleton*, 13 Id. 23; *Bucknam v. Bucknam*, 12 Me. 463; 1 U. S. Dig., Boundaries, 3.

The only circumstance relied on to control this presumption, is the fact found in the case, that in measuring the distance from the last-named boundary, in the description, to the road, it is in fact seven rods to the southerly side of the road, there indicated by a stone wall, between which and the traveled part of the road the brook runs for a little distance, and then turns in a southerly direction, enters the plaintiff's land, and runs through it to its outlet in a salt-water creek. But the court are of opinion that this fact does not rebut the strong presumption that boundary on a highway is *ad filum viæ*. The road is a monument; the thread of the road, in legal contemplation, is that monument or abuttal. By a well-known rule of construction of deeds and other instruments, calling for localities, measurements will yield to monuments. Suppose this had been northerly to the center of the highway, there measuring seven rods, and it in fact measured nine rods, no doubt this would have passed the soil to the center of the road. Land may no doubt be bounded by the side of a highway, but it must be done in clear and distinct terms to control the ordinary presumption. Perhaps this point is not very material to the present case, because it is conceded that from the highway it runs exclusively through the plaintiff's land; but as it is made, and as perhaps it makes the result more clear and satisfactory, we have examined it with the above result.

2. Taking this to be so, the defendants, by excavating an artificial pond or reservoir, on their own land, on the north side of the road, and placing a dam across the brook to raise the water in that reservoir, and thence by a culvert or pipe taking the water from the reservoir, along and across the road and into their own land, and conducting it thence to their mills, from which it is discharged into the salt water below the plaintiff's land, have effectually diverted a large portion of the entire volume of the water of the brook from the plaintiff's land.

This was an unwarrantable and injurious use of a common right to a watercourse, running in its natural channel, through the lands of several different proprietors. The rule of law is well settled, that each of such proprietors has a right to a reasonable and beneficial use of the current as it passes through

his own land; but he has no right to divert or corrupt it, so as to prevent the proprietor below him from having and enjoying the same use, for all usual and beneficial purposes. This substantial diversion of the watercourse, therefore, was unwarranted by any right of the defendants, as proprietors above, was an encroachment on the rights of the plaintiff, and prejudicial to her estate. And although the plaintiff has sustained no present damage, because she has had no mill upon it, or otherwise used it for any agricultural or manufacturing purpose, yet such diversion would prevent such beneficial use of it hereafter, and thus impair the value of the estate. It is therefore a case where an action can be maintained to vindicate [the plaintiff's right, and to prevent a loss of it by adverse possession and lapse of time.

Even where it has been considered that a riparian proprietor had authority to make use of the stream for purposes of irrigation, and thus by that use divert a portion of it, it has been held under the condition that such diversion was, under all circumstances, a reasonable use of the stream, and that the surplus of the water thus used must be returned into its natural channel. These cases carry a strong implication that a diversion of the entire stream, or of a considerable part of it, is prejudicial to the proprietor below, and not justifiable: *Weston v. Alden*, 8 Mass. 136; *Colburn v. Richards*, 13 Id. 420 [7 Am. Dec. 160]; *Cook v. Hull*, 3 Pick. 269 [15 Am. Dec. 208]; *Embrey v. Owen*, 6 Exch. 353.

8. We have not considered the act of the legislature as having any effect on the rights of the plaintiff. It seems to have been made *alio intuitu*, and solely as a license to the defendants to make a certain use of the highway, which would otherwise have been a public nuisance.

Judgment for the plaintiff for one dollar and costs.

BOUNDARY ON STREET OR HIGHWAY, WHEN INCLUDES SAME: See *Jackson v. Hathaway*, 8 Am. Dec. 263; *Sibley v. Holden*, 20 Id. 521; *Van O'Linda v. Lothrop*, 32 Id. 261, 262. The principal case was cited in *Paine v. Woods*, 108 Mass. 171, as repudiating the doctrine of *Tyler v. Hammond*, 11 Pick. 193, that the boundary by a highway generally extended only to the margin of the way; and in *Low v. Tibbetts*, 72 Me. 94, as somewhat explaining and restricting the apparent force of the latter case, and of *Sibley v. Holden*, 20 Am. Dec. 521. It was cited in *City of Boston v. Richardson*, 13 Allen, 152, to the point that however earlier cases in Massachusetts may have decided, the settled law of the commonwealth established by more recent decisions is that a deed bounding land generally by a highway, with no restriction or controlling words, conveys the grantor's title in the land to the middle of the

highway. The rule as thus stated is similarly laid down on the same authority in *Motley v. Sargent*, 119 Mass. 235; *Moody v. Palmer*, 50 Cal. 37; *Paul v. Carver*, 26 Pa. St. 225; and see *Mason v. Holt*, 1 Allen, 46; and it makes no difference that the measurement of the distance set forth brings the line only to the side of the highway: *Paul v. Carver*, Id. 226; *Motley v. Sargent*, *supra*. In *Phillips v. Bowers*, 7 Gray, 24, Shaw, C. J., uses the following language: "In inferring the intent of the parties to include in the grant the fee to the middle line of the way, from expressions used, possibly some distinction may be made between a case where the land is described as 'lying or bounding on a way, and where it is described as running 'to a way' and thence 'by the same way,' especially if in the former there are any words indicative of an intent that the grantee shall have a right to use the way rather than the fee of the land under it. But whatever may have been the fluctuation of opinion on this subject, as to one point it has lately been adjudged that in the latter of the above supposed cases, where a line is given running 'to the road, and thence by' the road, it extends to the *filum viæ*, or middle of the road; and that this inference is not controlled by the measurement of distances, showing that such measurement would extend only to the fence on the side of the road," citing the principal case. The learned chief justice also further cites this case (p. 25), to the point that where lots granted are described as running, after other courses, "to a street one rod and a half wide, thence northerly by said street," this would seem to carry the grant of the fee to the middle line of the street; and (p. 26) he says: "The rule as laid down and applied in the case of *Newhall v. Ireson* was so held in regard to a public highway. That the same rule would be applied when the line runs to a private way, I believe has not been expressly adjudged, though the case seems to be analogous." The chief justice seems afterwards to have dispelled his doubts with reference to boundaries upon private ways, for in *Peck v. Denniston*, 121 Mass. 18, he lays down the following broad rule, citing the principal case, with others: "The general rule is well settled that a boundary on a way, public or private, includes the soil to the center of the way, if owned by the grantor, and that the way thus referred to and understood is a monument which controls courses and distances, unless the deed by explicit statement or necessary implication requires a different construction." A conveyance of land "beginning at an angle in the stone wall on the easterly side of the aforesaid road," thence running around the rear of the lot granted "to a stake and stones at the aforesaid road, thence northerly on the line of said road to the first-mentioned bound," excludes the road; *Smith v. Slocumb*, 9 Gray, 38, distinguishing the principal case, in that in the latter the boundary was "to the road" and "on the road."

BOUNDARY ON STREAM, WHEN EXTENDS TO MIDDLE OF SAME: *Middleton v. Pritchard*, 38 Am. Dec. 112, and cases in note thereto.

RIPARIAN RIGHTS.—The right of each proprietor to the natural and uninterrupted flow of the stream, in the absence of any adverse right acquired, is well settled: *Gardner v. Newburgh*, 7 Am. Dec. 526, and note; *Coalter v. Hunter*, 15 Id. 726; *Martin v. Bigelow*, 16 Id. 696; *Society etc. v. Morris Canal etc. Co.*, 21 Id. 41; *Cooper v. Williams*, 22 Id. 745; S. C., 24 Id. 299; *Crooker v. Bragg*, 25 Id. 555; *Budlington v. Bradley*, 26 Id. 386; *Omelvany v. Jagers*, 27 Id. 417; *Ten Eyck v. Delaware & R. Canal Co.*, 37 Id. 233; *Evans v. Merriweather*, 38 Id. 106; *Plumleigh v. Dawson*, 41 Id. 199. But this right is subject to be exercised in a reasonable manner: *Merritt v. Brinkerhoff*, 8 Id. 404; *Blanchard v. Baker*, 23 Id. 504; *Hoy v. Sterrett*, 27 Id. 313; *Evans v. Merriweather*, 38 Id. 106; *Norton v. Valentine*, 39 Id. 220; *Wadsworth v. Tillotson*,

Id. 391; *Plumleigh v. Dawson*, 41 Id. 199; *Cary v. Daniels*, Id. 532; *Parker v. Griswold*, 42 Id. 739; *Miller v. Miller*, 49 Id. 545. A riparian proprietor has no right to injure or corrupt water to the injury of others: *Lewis v. Stein*, 50 Id. 177. As to the right of a riparian proprietor to restore a stream to its original channel after its diversion by a freshet, see *Woodbury v. Short*, 44 Id. 341; as to his right to change the mode, place, and quantity of his previous use, see *Whittier v. Cocheco Mfg. Co.*, 32 Id. 382; *Buddington v. Bradley*, 26 Id. 386. And see *McCalmont v. Whitaker*, 23 Id. 102, as to the water power to which he is entitled. A riparian proprietor is liable for the diversion of a stream by his agent, though such diversion is forbidden by him, if having notice that it is being made he makes no objection: *Evans v. Merriweather*, 38 Id. 106. See *Dwinel v. Barnard*, 48 Id. 507, in regard to the right of the public to use waters which have been diverted from their accustomed channel; *Brown v. Chadbourne*, 50 Id. 641, as to a riparian owner's rights where the stream is capable of being used to float logs, rafts, etc.; and *Heath v. Williams*, 43 Id. 265, and note, as to rights acquired by prior appropriation of a stream.

DAMAGES FOR DIVERSION OF STREAM.—Damage is presumed from the diversion of a stream: *Plumleigh v. Dawson*, 41 Am. Dec. 199. The right of a riparian proprietor to recover for damages exists, although no particular or actual damage has been sustained by reason of the diversion, and although at the time thereof no beneficial use of the stream was made: *Parker v. Griswold*, 42 Id. 739. Damages for nuisance in diverting water can only be given for injuries actually sustained prior to the commencement of the suit: *Thayer v. Brooks*, 49 Id. 474.

STATUTE AUTHORIZING OWNERS to erect piers and bulkheads, and fill up the river-bed in front of their lands, does not justify them in closing up the space between the river and the end of a street which ran over their land, so as to obstruct the passage from such street to the river: *People v. Lambier*, 47 Am. Dec. 273.

MISCELLANEOUS CITATIONS OF PRINCIPAL CASE.—Cited *Appleton v. Fullerton*, 1 Gray, 194, to the point that one making an unauthorized use of another's land, over which he has a right of way, is liable for nominal damages, although the owner of the land thereby sustains no actual damage; and see *Howes v. Grush*, 131 Mass. 215. Where the east side of a road was made the east side of a lot conveyed, the deed conveyed the fee in the road subject to the public easement, if any, then existing in it; and the description of the road as a town road, with a restricted covenant against incumbrances, implied that the land was subject to the public easement, except so far as the road had been discontinued by the proper authorities: *Leonard v. Adams*, 119 Id. 367.

INDEX TO THE NOTES.

ACCESSION, artificial, 586.

by affixing personal to real estate, 588.

confusion of goods, 589.

defined, 583.

ice, to whom belongs, 586.

increase of animals, to whom belongs, 584.

mixed, 597.

natural, classified, 584.

title by, 583-597.

trees, to whom belong, 586.

ACTION pending in another state can not be pleaded in abatement, 488.

ADMINISTRATOR, bankruptcy as a disqualification, 521.

gambler is incompetent to be, 521.

inability to read and write is a disqualification, 521.

minor can not be, 521.

partner can not be, 521.

who incompetent to be, 521.

ANIMALS, increase of mortgaged, 585.

increase of, to whom belongs, 584.

ASSIGNMENT for creditors, marshaling assets as between individual and partnership creditors, 203.

of judgments, 367-369.

of part of note or demand, 498.

ATTORNEY, communications made to person supposing he was an, 732.

communications made to student in office of, 736.

AUCTIONEER, liability of, for selling stolen goods, 305.

BANKRUPTCY, discharge in, effect of, 716.

BOUNDARY extends to middle of road, street, or private way, 794.

CHECK having no dollar mark or sign, 85.

COLOR OF TITLE, defined, 357.

CONFUSION OF GOODS, accidental, 594.

arising from consent of parties, 590.

arising from tortious act, 591.

defined, 589.

innocent or mistaken, 593.

subject to mortgage, 595.

CONTRACT, partly performed, recovery on, 479.

COVENANT of non-claim, estoppel arising from, 635, 636.

DAMAGES for diverting trade or custom, 727.

DEDICATION of land may be limited to specific uses, 782.

DEFINITION of color of title, 357.

of confusion of goods, 589.

of false imprisonment, 258.

of title by accession, 583.

of usury, 400.

DOMICILE of minor, 58.

EASEMENT, extinguishment by union of title and possession, 748.

EJECTMENT, judgment in, effect on after-acquired title, 546.

judgment in, effect on running of statute of limitations, 545-547.

recovery of distinct part on suit for the whole, 415-419.

recovery of undivided part on suit for the whole, 416, 417.

verdict for part, certainty required, 417.

verdict for undivided part, 418.

EQUITY, laches are discouraged in, 130.

laches of stockholders, 132.

laches of stockholders, when no ground for denying relief, 132, 133.

specific performance, laches as bar to suit for, 132.

specific performance, laches waiver of, 134.

specific performance, laches when not a bar to, 134.

stale demands, 130.

EVIDENCE, declaration of deceased owner, 741.

declaration of tenant showing under whom he held, 741.

of what witness understood from a certain conversation, 741.

onus probandi in action for breach of covenant of seisin, 508.

EXECUTION SALE, purchaser how protected by registration laws, 482.

EXECUTOR, alien may be, 518.

corporation can not be, 518.

improvidence as a disqualification, 520.

idiots and lunatics may not be, 518.

incompetency as a disqualification, 520.

infant, appointment of, as, 518.

insolvency no disqualification, 519.

married woman, whether may be, 518.

persons who may be, 518-520.

security, exacting from, 520.

FALSE IMPRISONMENT, actions for, form of, 268.

damages in actions for, 270.

defined, 258.

evidence in actions for, 270.

gravamen of offense of, 259.

indictment for, 269.

liability for arrest without warrant, 268.

liability of magistrate, 263.

liability of military officer, 262.

liability of officer making arrest, 266.

liability of party assisting in arrest, 267.

liability of party procuring arrest, 265.

liability of physician, 261.

FALSE IMPRISONMENT, magistrate, liability of, for, 263, 264.

- may be in one's own house, 259.
- military and naval officers' liability for, 262.
- military and naval officers' liability for harshness of subordinates, 263.
- miscellaneous instances of, 268.
- officer, liability for, 266, 267.
- officer, liability of person assisting, 267.
- physician making false certificate of lunacy, 261.
- pleadings in actions for, 269.
- requisites of, 259.
- violence not essential to, 259.

FISHERY, rights of public in, 769.

GARNISHMENT, inquiries by garnishee respecting proceedings, 408.

- of money collected under execution, 409.

GRAND JURY, power of, to compel attendance of witnesses, 763.

HIGHWAYS, adjacent lands, right of travelers to go over, in case of necessity, 731-734.

- banks of rivers as, 732.
- person knowing of defects in, can not recover for injuries, 469.
- right of traveler to make breaches in adjacent fence, 732.

HUSBAND AND WIFE, liability of husband after wife has obtained decree for alimony, 492.

- liability of husband for legal services rendered for wife, 492.

ICE, to whom belongs, 586.

INDICTMENT, amending caption of, 151.

- caption of, what must state, 151.
- for false imprisonment, 269.

INFANT, domicile of, 58.

INJUNCTION against trespass, 681.

INSOLVENT LAW, discharge under, effect on non-residents, 723.

INSURANCE by mortgagee for benefit of himself and mortgagor, 697.

- collision, liability of insurer for damages assessed against assured vessel on account of, 787-790.
- interest of mortgagee is subject of, 693.
- mortgagee, extent to which he may recover, 695.
- mortgagee, character and nature of insurance by, 693.
- mortgagee, rights of, when he insures independently of mortgagor, 693-695.
- mortgagee, rights of, to insurance effected by the mortgagor, 698.
- mortgagor has no interest in insurance effected by mortgagee, 696.
- negligence of the assured, 787.
- representations, when deemed warranties, 320.

JUDGMENT against one co-trespasser no bar to an action against the others, 205, 206.

- assignment by transfer of land, 368.
- assignment, effect of, at common law, 366.
- assignment, effect of, under statutes, 367.
- assignment, form of, 367.
- assignment for tort, 367.

- JUDGMENT**, assignment, liability against assignor arising from, 368.
assignment may be by parol, 368.
assignment, rights of assignee, 368.
assignment, when operates as a satisfaction, 369.
nil debit not a good plea to action on, 460.
relief in equity from, 466.
reversal, restitution after, 454.
what may be assigned, 367.
- LACHES**, as a bar to relief in equity, 130-134.
- LICENSE**, by parol, to cut and carry away wood, 167.
by parol, to mine, 508.
by parol, to use water, 167.
revoking, 166.
when irrevocable, 166.
- LIMITATION**, effect of judgment in ejectment on running of statute of, 545-547.
- MAGISTRATE**, liability of, for false imprisonment, 264.
- MANDAMUS** against executive, 604.
to compel removal of obstruction in street, 681.
- MORTGAGE**, accession to goods subject to, 596.
giving mortgagor permission to sell and replace, 595.
of unfinished articles, 588.
- MORTGAGEE**, rights of, under insurance of property, 693-698.
- NEGLIGENCE**, complaint in action for, 470.
contributory, knowledge of defect in highway, 469.
- NUISANCE**, injunction against, 351.
stable, when is a, 350.
- OFFICER**, liability of, for false imprisonment, 266.
- PARTITION**, compensation for rent in arrear, 432.
of property held adversely, 432.
- PARTNERSHIP**, lien of creditors, how affected by transfers, 338.
lien of creditors, in case of insolvency, 338.
- PATENT**, how construed, 411.
- PAYMENT**, recovery of voluntary, 718.
under mistake of law or fact, 719.
voluntary, what is, 718.
- PRINCIPAL AND AGENT**, signing by agent, form of, 720.
suit by principal on contract made by agent, 723.
- PRIVATE WAY**, right of traveler to go over adjacent land, 713.
- STALE DEMANDS**, equity does not enforce, 130-134.
- STATUTES**, power of courts to inquire into passage of, 466.
- STREET**, boundary line generally runs to center of, 794.
right of way passes by deed bounded by, 681.
- TENANCY IN COMMON** arising from confusion of goods, 590.
- TITLE** by accession, 583-597.
in manufactured articles, 586.
means of acquiring, classified, 583.
to fixtures, 588.

TITLE to ice, 586.

to increase of animals, 584.

to picture painted to order, 587.

to trees, 585.

TREES belong to owner of land on which roots grow, 585.

growing on division line, to whom belong, 585.

parol sale of, 586.

TRESPASSER, judgment against one does not bar action against the others, 205.

judgment against one, English rule, 205.

judgment against one, effect of taking out execution, 205.

liability of, is joint and several, 205.

USURY defined, 400.

judgment may bar action for money paid as, 402.

recovery of money paid as, 88, 401.

recovery of money paid as, decisions denying, 401.

recovery of money paid as set-off of, 402.

setting off against principal of money paid as, 402.

WARRANTY of quality, implied in executory contracts, 146.

of quality, vendee's remedy for breach of, 146.

WAY OF NECESSITY, right to go on adjoining land in case of obstruction of, 734.

WITNESS, grand jury's power over, 763.

AM. DEC. VOL. LIV—61

INDEX.

ABANDONMENT.

See CONTRACTS, 8-11.

ABATEMENT.

See PLEADING AND PRACTICE, 2, 10, 11, 24.

ABORTION.

See CRIMINAL LAW, 38, 39, 41, 42, 44, 46, 47.

ACCESSION.

OWNER OF PRINCIPAL MATERIALS ACQUIRES BY RIGHT OF ACCESSION the right of property in the whole where the materials of two persons are united by labor into a joint product. *Pulcifer v. Page*, 582.

See LIENS, 2.

ACCESSARIES.

See CRIMINAL LAW, 28.

ACCOUNT.

See EXECUTORS AND ADMINISTRATORS, 3, 5; PARTNERSHIP, 3.

ACKNOWLEDGMENTS.

See STATUTE OF LIMITATIONS, 9.

ACTIONS.

See AGENCY, 5; ASSUMPSIT; BANKRUPTCY AND INSOLVENCY; CONTRACTS, 2, 6, 7; CORPORATIONS, 3, 8; CO-TENANCY, 1; COVENANT; EJECTMENT; EQUITY, 2; EXECUTIONS, 6; HUSBAND AND WIFE, 5; JUDGMENTS, 34, 35; MARRIED WOMEN; NEGLIGENCE; NEGOTIABLE INSTRUMENTS, 5, 14; PHYSICIANS, 2; PLEADING AND PRACTICE, 27; REPLEVIN; SALES, 5, 6, 8, 9; TRADE NAMES, 1; TRESPASS; TROVER; TRUSTS AND TRUSTEES; USURY; WATERCOURSES, 1, 2.

ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

ADMISSIONS.

See ESTOPPEL, 3, 6; EVIDENCE, 23, 27; PARTNERSHIP, 18, 19; SURETYSHIP, 2.

ADVERSE POSSESSION.

1. ENTRY UNDER COLOR OF TITLE IS SUFFICIENT TO CONSTITUTE ADVERSE HOLDING or possession. *Beverly v. Burke*, 351.
 2. ADVERSE POSSESSION BY PERSONAL REPRESENTATIVE dates from the commencement of his own adverse possession, and not from that of the decedent. *Moffatt v. Buchanan*, 41.
 3. ADVERSE POSSESSION IS QUESTION to be determined exclusively by the jury. *Beverly v. Burke*, 351.
 4. TRUSTEE, BY ASSERTING ADVERSE RIGHT TO PROPERTY, can not divest himself of the character of trustee, nor vest title in himself until after the statute of limitations has run. *Moffatt v. Buchanan*, 41.
 5. POSSESSION IS NOT ADVERSE AGAINST OWNER OCCUPYING PART of the premises. *Marcy v. Stone*, 736.
- See CO-TENANCY, 2; DEEDS, 10; EJECTMENT, 7; EVIDENCE, 27; PARTITION, 3; STATUTE OF LIMITATIONS, 8.

AFFIDAVITS.

See NEW TRIAL, 2, 3; PLEADING AND PRACTICE, 13.

AGENCY.

1. GENERAL RULE IS THAT AGENTS CAN NOT ACT SO AS TO BIND THEIR PRINCIPALS where they have or represent interests adverse to the principals. *Wassell v. Reardon*, 245.
 2. DEED EXECUTED BY AGENT IN HIS OWN NAME is a nullity as to the principal, and the most that could be made of it would be a mere contract to procure a conveyance, but as such it is not binding in law upon the principal. *Fisher v. Salmon*, 297.
 3. POWER OF ATTORNEY TO SETTLE UP MERCANTILE BUSINESS, which had been conducted in the name of the principal, does not confer power to purchase, or to execute a note for the purchase price of real estate. *Id.*
 4. EXECUTION OF SEALED LEASE BY AUTHORIZED ATTORNEY SIGNING HIS OWN NAME "for" the principal (naming him), and affixing a seal, is valid. *Mussey v. Scott*, 719.
 5. EITHER PRINCIPAL OR FACTOR MAY SUE FOR PRICE of goods sold by the latter, though the principal's name was not disclosed. *Haley v. Merriam*, 721.
 6. CONTRACT MADE IN FOREIGN COUNTRY by an agent without authority, which is afterwards ratified by the principal, will be considered as made in the country where the latter resides. *Dord v. Bonnaffée*, 573.
- See ATTORNEY AND CLIENT, 5; AUCTIONS, 2; BANKRUPTCY AND INSOLVENCY, 3; CORPORATIONS, 3, 4, 6, 7; EVIDENCE, 20; GUARANTY; STATUTE OF LIMITATIONS, 7; TAXATION, 4; TROVER, 5.

ALIENS.

See TAXATION, 1.

ALTERATIONS.

See INSURANCE—FIRE, 9.

AMENDMENTS.

See CRIMINAL LAW, 1, 2; EVIDENCE, 11; EXECUTIONS, 7; PLEADING AND PRACTICE, 20; RECORDS.

ANCIENT WRITINGS.

See EVIDENCE, 9.

ANIMALS.

See ASSUMPSIT, 2.

ANSWERS.

See ATTACHMENTS, 10, 11; BONA FIDE PURCHASERS, 4; EQUITY, 7; PLEADING AND PRACTICE, 9, 12, 13.

APPEALS.

See ATTACHMENTS, 5, 8; EXECUTIONS, 3; JURISDICTION, 7, 8, 10-13; PLEADING AND PRACTICE.

APPURTENANCES.

See DEEDS, 8; EASEMENTS, 7, 8.

ARREST.

See CRIMINAL LAW, 15-17, 20; TRESPASS, 7.

ASSAULT.

See JURY AND JURORS, 14.

ASSESSMENTS.

See TAXATION, 4-7.

ASSESSORS.

See TAXATION, 4-7.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

1. ASSIGNMENT FOR BENEFIT OF CREDITORS, when made in a country where such assignments are legal, will be valid against all creditors who are residents of countries governed by similar laws. *Dord v. Bonnaffée*, 573.
2. ASSIGNMENT FOR BENEFIT OF CREDITORS, when made in New York and valid there, will be treated as valid in Louisiana. *Id.*

ASSIGNMENT OF CONTRACTS.

AGREEMENT TO PAY SUM OUT OF NOTE WHEN COLLECTED IS EQUITABLE ASSIGNMENT of such sum, which can not be claimed as assets of the estate of the insolvent holder of the note. *Gallinger v. Pomeroy*, 496.

See JUDGMENTS, 37-41; LICENSES, 1; NEGOTIABLE INSTRUMENTS, 7.

ASSUMPSIT.

1. TO ENABLE OWNER OF GOODS TO WAIVE TORT and sue in *assumpsit*, where they have been wrongfully taken from him, the goods must have been converted into money. *Stearns v. Dillingham*, 88.

2. **WHERE SHEEP OF ONE PERSON BREAK INTO ANOTHER'S PASTURE** from time to time, and depasture the same, the owner of the sheep can not, of his own mere motion, waive the tort and sue in *assumpsit* for the pasturing of the sheep; to authorize him to do this, there must have been what would amount to the consent of both parties that it should be considered as a matter resting in contract. *Id.*

See **CONTRACTS**, 6; **SALES**, 8; **USURY**, 1, 5.

ATTAINT.

See **JURY AND JURORS**, 6, 7, 9, 12.

ATTACHMENTS.

1. **OFFICER ATTACHING PROPERTY ON MESNE PROCESS IS NOT RESPONSIBLE** for any irregularity of another officer in selling the property on execution. *Paul v. Slason*, 75.
2. **WHERE OFFICER IS SEEN DRIVING HORSE AND WAGON** that had been attached by him, the jury may infer, in the absence of proof to the contrary, that he was removing them to a place for conveniently keeping them while subject to the attachment. *Id.*
3. **GARNISHEE NOT LIABLE** unless it appears that he had "property, credits, or effects" in his possession belonging to the defendant in the attachment suit, or was "indebted" to him. *Carson v. Allen*, 148.
4. **MAKERS OF PROMISSORY NOTE NOT LIABLE UNDER GARNISHEE PROCESS** when the note is not due, and not shown to be owned by or in the possession of the attachment debtor at the time of serving the garnishee process. *Id.*
5. **GARNISHEE MAY INQUIRE INTO JURISDICTION OF COURT RENDERING JUDGMENT** against defendant in attachment, in a proceeding on writ of error to reverse the judgment pronounced against himself, and if that court had no jurisdiction, the judgment against the garnishee will be reversed. *Pierce v. Carleton*, 405.
6. **GARNISHEE WILL NOT BE PROTECTED IN PAYMENT OF JUDGMENT** against himself based on void proceedings against the defendant in attachment. *Id.*
7. **JUDGMENT AGAINST DEFENDANT IN ATTACHMENT BY COURT HAVING JURISDICTION** can not be attacked by the garnishee, for he is protected by such judgment, but only by the defendant in a direct proceeding for the purpose. *Id.*
8. **WHEN CERTIFICATE OF PUBLICATION OF NOTICE OF PENDENCY OF ATTACHMENT** shows that the notice was published in due time, in a certain newspaper, it may be shown by parol that the signature thereto is that of the publishers of the newspaper, and that the newspaper is published at the place required by law; and the appellate court will presume that this was done to the satisfaction of the lower court. *Id.*
9. **SURPLUS BELONGING TO DEFENDANT AND IN HANDS OF OFFICER** after satisfaction of execution may be reached by garnishment. *Id.*
10. **ANSWER OF GARNISHEE IS DEEMED TRUE** until disproved or contradicted. *Id.*
11. **JUDGMENT MUST NOT BE GIVEN ON ANSWER OF GARNISHEE**, unless it clearly makes him chargeable. *Id.*

See **JUDGMENTS**, 37-39; **TRESPASS**, 4, 6.

ATTESTATION.

See WILLS, 2.

ATTORNEY AND CLIENT.

1. ATTORNEYS, COUNSELORS, AND SOLICITORS ARE NOT PERMITTED TO DISCLOSE, without the assent of their clients, communications made to them in reference to their professional employment. *McLellan v. Longfellow*, 599.
2. COMMUNICATIONS TO ATTORNEYS ARE PROTECTED, THOUGH MADE UNDER NO SPECIAL INJUNCTION OF SECRECY, and though the client do not understand the extent of the privilege. *Id.*
3. COMMUNICATIONS TO ATTORNEYS ARE PROTECTED WHEN MADE WITH A VIEW TO PROFESSIONAL EMPLOYMENT, and in reference to such employment in legal proceedings pending or contemplated, or in any other legitimate professional services wherein professional advice or aid is sought. *Id.*
4. CLIENT MAY WAIVE PRIVILEGE PROTECTING FROM DISCLOSURE COMMUNICATIONS MADE TO HIS ATTORNEY. *Id.*
5. AGENT OF BOTH PARTIES.—Plaintiff's attorney, employed to collect a note, was appointed by the defendant with knowledge of the fact, his attorney in fact to confess judgment on said note: *Held*, that the exercise of said power by said attorney was consistent with fair dealing. *Wassell v. Reardon*, 245.
6. COMMUNICATIONS TO STUDENT OF LAW in an attorney's office by one seeking advice are not privileged, though made under the impression that the student was an attorney. *Barnes v. Harris*, 734.

See EXECUTIONS, 18; INSANITY; JUDGMENTS, 2, 3; MARRIAGE AND DIVORCE, 2.

AUCTIONS.

1. AUCTIONEER'S MEMORANDUM OF SALE.—An entry in the sale book of an auctioneer in the afternoon of the same day the sale occurred does not comply with the requirements of that section of the statute of frauds which requires the entry to be made at the time of the sale. *Craig v. Godfroy*, 299.
2. AUCTIONEER IS AGENT OF BOTH PARTIES AT TIME OF SALE.—As his authority ceases at that time, an entry by him in his sale book at a subsequent period does not bind the purchaser. *Id.*
3. AUCTIONEER WHO RECEIVES AND SELLS STOLEN PROPERTY is liable for the conversion to the same extent as any other merchant, and there is no principle of policy for the encouragement of trade or convenience of business under which he can claim an exemption. *Rogers v. Huie*, 300.

AUTHENTICATION OF JUDGMENTS.

See JUDGMENTS, 5.

BAILMENTS.

See EXECUTIONS, 25.

BANK NOTES.

See CRIMINAL LAW, 4, 24.

BANKRUPTCY AND INSOLVENCY.

1. RIGHT TO SUE FOR TORT IS NOT SUCH RIGHT OF PROPERTY as vests in the assignee of a bankrupt, under the United States bankrupt act of 1841. *Nichols v. Bellows*, 85.
2. JUDGMENT OBTAINED SINCE FILING OF PETITION IN BANKRUPTCY on promissory note which might have been proved in bankruptcy is not barred by the discharge in bankruptcy, as it is a debt accruing since the petition. *Pike v. McDonald*, 597.
3. DISCHARGE UNDER STATE INSOLVENT LAW DOES NOT BAR ACTION BY NON-RESIDENT principal for the price of goods sold by his factor residing within the state to the insolvent, though the bills were made out in the factor's name as vendor, where he informed the debtor that he was selling on commission for a citizen of another state, but did not name him. *Haley v. Merriam*, 721.
4. DISCHARGE UNDER BANKRUPT LAW OF FOREIGN COUNTRY of an acceptor of a bill drawn in Massachusetts, where the drawer and payee resided, but accepted and made payable in such foreign country, the acceptor being a resident there, is a bar to an action against him in Massachusetts, though the claim was not proved under the bankruptcy; *a fortiori* if it was so proved. *May v. Breed*, 700.

See ASSIGNMENT OF CONTRACTS; PARTNERSHIP, 5, 6, 8, 13; USURY, 2.

BANKS AND BANKING.

NOTES ISSUED BY BANK ORGANIZED UNDER UNCONSTITUTIONAL LAW ARE VOID, and constitute no consideration for a promissory note. *Per Perkins, J. Skinner v. Deming*, 463.

See CRIMINAL LAW, 4; EVIDENCE, 6.

BIDS.

See EXECUTIONS, 8.

BILLS OF EXCEPTIONS.

See CRIMINAL LAW, 5, 6; JURY AND JURORS, 7, 9; PLEADING AND PRACTICE, 21.

BILLS OF EXCHANGE.

See BANKRUPTCY AND INSOLVENCY, 4; NEGOTIABLE INSTRUMENTS, 4, 7.

BONA FIDE PURCHASERS.

1. VALUE OF PERMANENT AND USEFUL IMPROVEMENTS MAY BE SET OFF BY BONA FIDE PURCHASER for value and without notice against the claim of the rightful owner to the extent of the rents and profits. *Byers v. Fowler*, 271.
2. BONA FIDE PURCHASER WILL NOT BE CHARGED WITH COMPLAINANT'S COSTS when he defends against a suit brought to recover the property purchased, and fails. *Id.*
3. EQUITY OF BONA FIDE PURCHASER FROM FRAUDULENT VENDER IN EXECUTION SALE is prior to that of one who purchases the same property under a subsequent judgment against the same defendant. *Id.*

4. ANSWER SETTING UP DEFENSE OF "BONA FIDE PURCHASER" IS DEFECTIVE if it fails to aver a want of notice down to the delivery of the deed. *Id.*
See DEEDS, 9; EXECUTIONS, 8, 11; JUDGMENTS, 40.

BONDS FOR TITLE.

See EVIDENCE, 7.

BOUNDARIES.

BOUNDARY OF LAND IS PRESUMED TO BE MIDDLE OF HIGHWAY, when described in the deed as running northerly a certain distance to the highway, and thence upon the highway; and the fact that the distance when measured carries the line only to the southerly side of the highway, does not rebut the presumption. *Newhall v. Ireson*, 790.

See HIGHWAYS, 3, 4; PUBLIC LANDS, 4.

BUILDING CONTRACTS.

See CONTRACTS, 10, 11; LIENS, 4.

BURDEN OF PROOF.

See COVENANTS, 2; EVIDENCE; INSURANCE—FIRE, 8; PARTNERSHIP, 14; WILLS, 1; WITNESSES, 1.

CARRIERS.

See COMMON CARRIERS.

CERTIFICATES.

See WILLS, 2.

CHAMPERTY.

See EJECTMENT, 7.

CHARTERS.

See CORPORATIONS, 6-8; EVIDENCE, 7.

CHILDREN.

See NEGLIGENCE, 2, 3; PARENT AND CHILD.

CIRCUIT COURTS.

See EXECUTIONS, 19, 20; JUDGMENTS, 21, 23, 25; JURISDICTION, 5, 6.

CITIZENSHIP.

See CONSTITUTIONAL LAW, 2, 3; ELECTIONS, 1.

COLLISIONS.

See INSURANCE—MARINE; SHIPPING, 1-3.

COLOR OF TITLE.

See VENDOR AND VENDEE, 2.

COMMISSIONERS.

See ELECTIONS, 1; PLEADING AND PRACTICE, 4.

COMMON CARRIERS.

COMMON CARRIER CAN NOT BY SPECIAL AGREEMENT EXEMPT HIMSELF from liability for losses occasioned by the gross negligence of himself or of his servants. *Reno v. Hogan*, 513.

See **RAILROADS; SHIPPING; TRADE NAMES.**

COMMON COUNTS.

See **STATUTE OF LIMITATIONS, 3.**

CONDITIONS.

See **CONSTITUTIONAL LAW, 6; NEGOTIABLE INSTRUMENTS, 5; VENDOR AND VENDEE, 3.**

CONFESSION OF JUDGMENTS.

See **ATTORNEY AND CLIENT, 5; JUDGMENTS, 2, 3; STATUTE OF LIMITATIONS, 7.**

CONFLICT OF LAWS.

LAW OF PLACE WHERE CONTRACT IS MADE and to be performed governs not only as to its execution, authentication, and construction, but also as to the legal obligations arising from it, and as to what is to be deemed a performance, satisfaction, or discharge. *May v. Breed*, 700.

See **AGENCY, 6; ASSIGNMENTS FOR BENEFIT OF CREDITORS; BANKRUPTCY AND INSOLVENCY, 4; CONTRACTS, 1; MARRIAGE AND DIVORCE, 1.**

CONFUSION OF GOODS.

See **LIENS, 2.**

CONSIDERATION.

See **BANKS AND BANKING; CONTRACTS, 2; DEEDS, 1; EVIDENCE, 18; GUARANTY; PUBLIC LANDS, 10; STATUTE OF LIMITATIONS, 2.**

CONSTABLES.

See **EXECUTIONS, 24; SURETYSHIP.**

CONSTITUTIONAL LAW.

1. **POWERS OF GOVERNMENT ARE DIVIDED BY CONSTITUTION INTO THREE DISTINCT DEPARTMENTS**, and no person belonging to one of these can exercise any of the powers properly belonging to either of the others, except in cases expressly directed or permitted. *Dennett, Petitioner*, 602.
2. **RIGHTS SECURED BY SECTION 2 OF ARTICLE 4 OF CONSTITUTION** of the United States, to citizens of the several states, are those privileges and immunities that are common to the citizens of any state under its constitution and laws. But the right of a corporation to do any corporate acts beyond the limits of the state which creates it is not such a privilege or immunity, and can not, therefore, be regarded as embraced within this clause of the constitution. *Commonwealth v. Milton*, 522.
3. **GUARANTY TO CITIZENS OF EACH STATE OF ALL PRIVILEGES** and immunities of citizens in the several states implies no concession by or in one state to the laws of any other state, and imparts no extraterritorial vigor to the laws of any state. *Id.*

4. COURT MAY DECLARE ACT OF LEGISLATURE UNCONSTITUTIONAL. *Winter v. Jones*, 379.
 5. EXTENT OF CHANGE IN CONTRACT, BY ACT OF LEGISLATURE, is immaterial, in order to make said act unconstitutional, as impairing the obligation of contracts. *Id.*
 6. IMPOSING CONDITIONS NOT EXPRESSED IN CONTRACT, or any slight deviation from its terms, is within the constitutional prohibition. *Id.*
 7. CONTACT BETWEEN INDIVIDUAL AND STATE IS EQUALLY PROTECTED by the constitution with a contract between private parties. *Id.*
 8. RIGHTS CREATED BY ACT OF LEGISLATURE, BEING EQUIVALENT TO CONTRACT EXECUTED, can not be impaired by a subsequent legislature. *Id.*
 9. COURTS HAVE NOTHING TO DO WITH WISDOM, SOUND POLICY, OR EXPEDIENCY OF LAW. *Id.*
 10. LAW SHOULD BE UPHOLD AS VALID IF POSSIBLE. *Id.*
 11. WHERE LITERAL CONSTRUCTION OF STATUTE WOULD PRODUCE RESULTS UNJUST and violative of the constitution, the general language of the statute must be restricted so as to accomplish the general intent and declared result of the statute without producing such results, or else it must be declared to be a plain violation of the provisions of the constitution, and therefore void. *Preston v. Drew*, 639.
 12. LEGISLATURE OF STATE MAY DETERMINE THAT ARTICLES INJURIOUS TO PUBLIC HEALTH or morals shall not constitute property within its jurisdiction, where the enactment is to operate prospectively. And a declaration by the legislature that no person shall acquire any property in spirituous liquors intended to be used as a beverage would not violate any provision of the constitution. *Id.*
 13. CONSTITUTIONALITY OF LAW.—An act of the legislature provided for the sale of land, and the payment of a certain fee to take out a deed from the state. A subsequent act provided that unless the deed was paid for within a certain time the land would be forfeited to the state. *Held*, that the latter act was unconstitutional, as impairing the obligation of the above contract. *Winter v. Jones*, 379.
- See BANKS AND BANKING; ELECTIONS, 2; LIENS, 1; PUBLIC LANDS, 1, 9; TAXATION.

CONSTRUCTION.

See CONSTITUTIONAL LAW, 9-11; INSURANCE—FIRE, 5; PLEADING AND PRACTICE, 21; PUBLIC LANDS, 2; STATUTES; USURY, 6.

CONTRACTS.

1. CONTRACTS MADE BY WRITTEN COMMUNICATION between residents of different countries will be considered as made in the country where the final assent is given. *Dord v. Bonnaffée*, 573.
2. WHERE THERE IS TOTAL FAILURE OF CONSIDERATION, and the defendant has derived no benefit from the contract, or none beyond the amount of money which he has already advanced, such total failure of consideration may be shown in bar of the action. *Morrow v. Hanson*, 346.
3. TIME IN CONTRACT NOT ESSENTIAL, IN GENERAL, in equity, where circumstances of a reasonable nature have prevented a party from strict compliance in that particular. *Garretson v. Vanloon*, 492.

4. **TIME IN CONTRACT MAY BE MADE MATERIAL** either by express agreement or by the peculiar nature and conditions of the contract. *Id.*
 5. **INTENTIONS OF PARTIES AS REGARDS TIME OF PERFORMANCE WILL BE SECURED** in equity as at law, and when time appears to be a distinct or essential feature in the contract, it should be considered material and be enforced. *Id.*
 6. **PARTIES TO CONTRACT ARE LIABLE** according to the form in which they respectively execute the contract. One party may be liable in *assumpsit*, while the other is liable in covenant. *St. Andrew's B. L. Co. v. Mitchell*, 340.
 7. **ACCEPTANCE AND USE OF WORK PERFORMED AND MATERIALS FURNISHED** render one answerable on an implied promise to pay for the value he has received to the amount whereby he is benefited, though the work done and materials furnished be not in the manner stipulated in a special contract therefor, and no action can be maintained on the same. *McKinney v. Springer*, 470.
 8. **COMPENSATION FOR LABOR AND MATERIALS OF WHICH ANOTHER HAS BENEFIT**, equal to the benefit received, may be recovered on an implied contract, irrespective of the question whether the work was finally abandoned at the employer's requirement or not, before its completion. *Id.*
 9. **MODE OF ASCERTAINING REAL BENEFIT RECEIVED FROM PART PERFORMANCE ONLY OF WORK**, through the employee's default, is to estimate the whole work at the contract price, and deduct from that the amount necessary to complete the portions of the work left unfinished; and, it seems, special damages sustained through non-performance of the contract may be recouped, or a cross-action brought to recover them. *Id.*
 10. **VALUE OF LOT TO BE CONVEYED IN CONSIDERATION OF BUILDING HOUSE** represents the compensation the employee was to receive for the whole work, and from it must be deducted the amount necessary to make up the employee's deficiencies in completing his contract, where the work was abandoned by the latter, but accepted by the employer. *Id.*
 11. **ORIGINAL SPECIAL CONTRACT STILL EXISTS**, and is binding on the parties, so far as it can be followed, when they agree to additions and alterations of a building in process of construction under such contract, unless the contract be so entirely abandoned that it is impossible to trace it and say to what part of the work it shall be applied. *Id.*
- See** AGENCY; BANKS AND BANKING; COMMON CARRIERS; CONFLICT OF LAWS; CONSTITUTIONAL LAW, 5-8, 13; CORPORATIONS; COVENANT; EVIDENCE, 14-18; INSANITY; INSURANCE—FIRE; JUDGMENTS, 24; RAILROADS; SPECIFIC PERFORMANCE; STATUTE OF FRAUDS; STATUTE OF LIMITATIONS; USURY; VENDOR AND VENDEE.

CONTRIBUTION.

See PARTNERSHIP, 18.

CONTRIBUTORY NEGLIGENCE.

See MASTER AND SERVANT, 3.

CONVERSION.

See AUCTIONS, 3; EXECUTIONS, 25; TROVER.

CONVICTION.

See CRIMINAL LAW.

CORPORATIONS.

1. **RIGHT OF INDIVIDUALS TO BE CORPORATION AND TO ACT IN CORPORATE CAPACITY** is a peculiar privilege, the creation of local law, and can not by the mere force of that law exist or be exercised beyond the territorial limits of the state which enacts it. *Commonwealth v. Milton*, 522.
2. **RIGHT OF CORPORATION OF ONE STATE TO EXERCISE ITS CORPORATE POWERS** within another state is dependent upon the will of the state in which the exercise of such right is attempted, and is subject to be interdicted by it. *Id.*
3. **FORM OF ACTION AGAINST CORPORATION** is not determined by the form in which the agent contracts. *St. Andrew's B. L. Co. v. Mitchell*, 340.
4. **WHETHER AGENT OF CORPORATION IS APPOINTED BY OFFICIAL ACT** under the corporate seal or by a mere resolution of the directors is immaterial. *Id.*
5. **DEED PROFESSING TO HAVE BEEN MADE BY CORPORATION**, signed and sealed by a committee of the same, will be presumed to be the deed of the corporation, when the latter ratifies and adopts the act by bringing suit against the other party for a breach of the contract. *Id.*
6. **IT IS NOT NECESSARY THAT CHARTER OF CORPORATION SHOULD CONFER POWER OF CONTRACTING BY AGENT** or committee in order to give it that right, as all aggregate corporations from necessity must act and contract through and by means of agents. *Id.*
7. **WHEN MODE IS PRESCRIBED IN CHARTER** or act of incorporation, in which the officers or agents of a corporation must act, that mode must be strictly pursued in order to render their acts or contracts obligatory on the corporation. *Id.*
8. **SPECIAL TRIBUNAL CONSTITUTED BY CHARTER OF PRIVATE CORPORATION**, for redress of certain injuries resulting from failure of the corporation to perform its duties, need not be consulted before bringing an action at law for injuries over which the charter has given it no jurisdiction. *Bassett v. Carleton*, 605.
9. **MUNICIPAL CORPORATION NOT LIABLE FOR INJURIES TO PRIVATE PROPERTY BY OVERFLOW** through the insufficiency of a culvert and embankment, erected by it on a street or road within the corporate limits across a stream, to resist an extraordinary flood not contemplated by ordinarily skillful engineers, and where such improvement had proved sufficient for several years. *City of Madison v. Ross*, 481.
10. **DEGREE OF CARE AND FORESIGHT NECESSARY IN ERECTION OF PUBLIC IMPROVEMENTS** must be in proportion to the nature and magnitude of the injury likely to result from the occurrence to be anticipated and guarded against, and should be that care and prudence which a discreet and cautious man would or ought to use, if the risk and loss were to be exclusively his own. *Id.*

See CONSTITUTIONAL LAW, 2; HIGHWAYS, 7; MANDAMUS; PARTNERSHIP, 13; TAXATION, 2.

COSTS.

See BONA FIDE PURCHASERS, 2.

CO-TENANCY.

1. TENANTS IN COMMON MAY JOIN OR SEVER IN PERSONAL ACTIONS for injuries to the land. *Palmer v. Dougherty*, 636.
2. POSSESSION BY TENANT IN COMMON IS NOT DEEMED ADVERSE to his co-tenant. *Marcy v. Stone*, 736.

See PARTITION; TROVER, 4, 5.

COUNTERFEITING.

See CRIMINAL LAW, 11, 12.

COUNTY COURTS.

See EXECUTIONS, 7.

COURTS.

See EXECUTIONS, 7, 19, 20; JUDGMENTS, 21, 23, 25; JURISDICTION; MANDAMUS; OFFICES AND OFFICERS, 1; PROBATE COURTS.

COVENANT.

ACTION OF COVENANT IS PROPER REMEDY for all breaches of contract under seal. *St. Andrew's B. L. Co. v. Mitchell*, 340.

See CONTRACTS, 6.

COVENANTS.

1. PARTY SELLING PROPERTY LYING WITHIN LIMITS OF CITY, and in the conveyance bounding such property by streets, designated as such in the conveyance, or on a map made by the city or by the owner of the property, impliedly covenants that the purchaser shall have the use of such streets, although at the time of the sale they are unopened. *White v. Flannigan*, 668.
2. ONUS PROBANDI LIES UPON DEFENDANT in action for breach of covenant of seisin, where he pleads that he was lawfully seized of the premises. *Swafford v. Whipple*, 498.
3. MEASURE OF DAMAGES FOR BREACH OF COVENANT OF SEISIN is the consideration money paid and interest thereon. *Id.*

See DEEDS, 1; ESTOPPEL, 1.

CREDITOR'S SUIT.

See EXECUTIONS, 3.

CRIMINAL LAW.

1. INDICTMENTS CAN NOT BE AMENDED, but a caption is no part of an indictment. *State v. McCarty*, 150.
2. CAPTION TO INDICTMENT NEED NOT STATE AT LENGTH the qualifications of the grand jurors, nor recite all the facts which give the court jurisdiction, when the court in which the indictment is found is one of general criminal jurisdiction. *Id.*
3. AMENDMENTS TO CAPTION OF INDICTMENT furnish no reason for arresting judgment, where the indictment was good in every respect before the amendments, and their allowance did not prejudice the defendant. *Id.*

4. **INDICTMENT CHARGING STEALING OF BANK NOTES** **NO** **NOMINE** IS **SUFFICIENT**, the number, denomination, and value of the notes being stated. *State v. Williams*, 184.
5. **IN CRIMINAL CASES THERE NEVER WAS ANY REMEDY BY BILL OF EXCEPTIONS**, either in England or in the federal courts of the United States. *State v. Croteau*, 90.
6. **IN VERMONT ACCUSED MAY, IN CASE OF CONVICTION, FILE EXCEPTIONS** to any decision or ruling of the judge on the trial, and carry the matter of law to the supreme court, but no provision is made for exceptions in behalf of the state, and a verdict of acquittal is beyond the reach of the appellate court. *Id.*
7. **NEW TRIAL IS NEVER GRANTED ON APPLICATION OF THE CROWN** in the modern English practice in criminal cases, but only on the application of the prisoner, after a verdict of guilty. *Id.*
8. **COURT HAS NO POWER TO GRANT NEW TRIAL IN CRIMINAL CASE**, after a verdict of acquittal has been rendered, however much it may disapprove of such verdict. *Id.*
9. **THAT FORMER CONVICTION WAS PROCURED BY FRAUD** of defendant before a justice of the peace under the small-offense law, is a good replication to a plea of former conviction. *State v. Colvin*, 58.
10. **THAT FORMER CONVICTION WAS PROCURED WITHOUT JUSTICE HEARING EVIDENCE**, is a good replication to a plea of former conviction. *Id.*
11. **TIME WHEN COIN COUNTERFEITED WAS CURRENT** by law, usage, or custom is an ingredient of the offense; and an indictment for counterfeiting in which such time is not stated is defective. *Nicholson v. State*, 168.
12. **IN INDICTMENT, TIME AND PLACE MUST BE ADDED** to every material fact. *Id.*
13. **IN FALSE IMPRISONMENT IT DEVOLVES UPON DEFENDANT TO MAKE OUT JUSTIFICATION** where the fact of confinement has been shown by the state. *Mitchell v. State*, 253.
14. **DEFENDANT IN FALSE IMPRISONMENT ATTEMPTING TO JUSTIFY UNDER WARRANT** must show one valid and legal upon its face. *Id.*
15. **PERSONS ARE ONLY BOUND TO AID AN OFFICER** in such cases as he himself would be authorized to act; they are held to the same strictness of authority as is required of the officer himself, and if the act of the officer is unlawful, any one assisting him is equally liable with him, although he acts by the officer's commands. *Id.*
16. **DEFENDANT PROCURING ARREST WITHOUT ANY LEGAL WARRANT**, authority, or reasonable or justifiable cause, is guilty of false imprisonment, although he was not actually present when the arrest was made. *Floyd v. State*, 250.
17. **DEFENDANT IN FALSE IMPRISONMENT ATTEMPTING TO JUSTIFY UNDER WARRANT** of arrest must produce one that is legal and valid upon its face, and he is not excused from a similar showing where he does not offer the warrant itself, but rests and relies upon proving its contents. *Id.*
18. **TO ESTABLISH OFFENSE OF FALSE IMPRISONMENT** on the part of the state, the state is only required to show the imprisonment. *Id.*
19. **EVERY CONFINEMENT OF THE PERSON IS IMPRISONMENT**, whether it be in a common prison or in a private house, or in the stocks, or even by forcibly detaining one in the public streets. *Id.*

20. CHARGE SHOULD BE SET OUT IN WARRANT OF ARREST under our statutes. *Id.*
21. ON TRIAL OF INDICTMENT FOR SELLING SPIRITUOUS LIQUORS WITHOUT LICENSE the prosecution may, after having offered evidence of the distinct sales charged in the several counts of the indictment, give testimony tending to prove other sales made by the accused at other times within the period named in the indictment. *State v. Croteau*, 90.
22. IT IS IMPORTANT TO INQUIRE WHETHER PARTY ACCUSED OF CRIME had any motive to commit such crime. *Bullock v. State*, 369.
23. FACT THAT ACCUSED PURCHASED NUMBER OF LOTTERY TICKETS before money was taken from a bank is admissible in evidence for the purpose of showing a motive for the taking. *Id.*
24. DESCRIPTION IN INDICTMENT—GENERAL RULE.—Bank bills described as being of a particular denomination, issued by a certain bank, signed by the president and countersigned by the cashier of the bank, the same being the property of said bank, is a sufficient description to meet the requirements of the general rule which requires the description in an indictment to be sufficiently certain and precise to enable the accused to understand the general nature of the crime of which he is accused. *Id.*
25. DEFENDANT CAN NOT BE ACCUSED OF TWO DISTINCT OFFENSES IN INDICTMENT, but the same offense, or the same species of offense, may be charged in different ways in order to meet the evidence. *Id.*
26. DIFFERENT PUNISHMENTS WERE PROVIDED FOR CONVICTION UNDER TWO COUNTS OF INDICTMENT: *Held*, that upon a general verdict of guilty, the presumption of law was that a conviction of the greater crime was intended. *Id.*
27. COMMENT UPON TESTIMONY—EXPRESSION OF OPINION.—Instruction to jury "that it was competent for them to look to circumstantial testimony, as, for instance, the acts and conduct of accused, to ascertain his guilt, such as his absconding and concealing himself for the purpose of escaping the laws, or his being possessed of or using large sums of money which he could not honestly account for," does not amount to an expression of opinion as to the guilt or innocence of the accused. *Id.*
28. ACCUSATION IN INDICTMENT AGAINST PRINCIPAL AND ACCESSARY, which commences and concludes in the manner provided by statute, amounts to but one count, and objection that each is separate and should have the statutory conclusion is not well taken. *Id.*
29. HOMICIDE IS NOT JUSTIFIABLE TO PREVENT MERE MISDEMEANORS, or even felonies without force. *Carmouche v. Bonis*, 558.
30. PARTY WHO FIRES ON SLAVE WHILE LATTER IS ATTEMPTING LARCENY, and kills him, will be liable *in solido* for his value. *Id.*
31. COMMON-LAW RULE THAT DEATH OCCURRING BY ACT OF ONE in pursuit of an unlawful design, without any intention to kill, will be either murder or manslaughter according as the intended offense is a felony or only a misdemeanor, is in force in Maine. *State v. Smith*, 578.
32. DISTINCTION BETWEEN FELONY AND MISDEMEANOR in case of offense, in perpetration of which another's death is caused, depends upon the gradation made by statute, not upon the common-law classification. *Id.*
33. OFFENSE WHICH MAY BE PUNISHED BY IMPRISONMENT IN STATE PRISON is a felony under the Maine statute, and its character remains unchanged

- by the fact that it may also be punished merely by imprisonment in the county jail or by imposition of a fine. *Id.*
34. PRISONER IS TO BE CONSIDERED INNOCENT UNTIL HIS GUILT IS PROVED. *Id.*
35. TO CONVICT OF MURDER JURY MUST BELIEVE BEYOND ALL REASONABLE DOUBT; ⁱⁿ view of all the testimony, that the defendant is guilty, but it is not requisite that they should believe a particular witness beyond all reasonable doubt. *Id.*
36. WHATEVER ALLEGATION IN INDICTMENT IS DESCRIPTIVE OF OFFENSE MUST BE PROVED. *Id.*
37. FACT STATED IN INDICTMENT MAY BE REJECTED AS SURPLUSAGE if it be merely in aggravation, so that it may be stricken out and yet leave the offense fully described. *Id.*
38. ALLEGATION THAT DECEASED WAS QUICK WITH CHILD NEED NOT BE PROVED, and may be disregarded by the jury on the trial of an indictment for murder resulting from an attempt to procure an abortion, as such allegation is not essential to a description of the offense. *Id.*
39. THAT DEATH RESULTED FROM USE OF SPECIFIED METALLIC INSTRUMENT described in an indictment for murder, committed in an attempt to procure an abortion, need not be proved on the trial, but it will be sufficient if the death is proved to have resulted from the use of some other instrument, if the nature of the violence and the kind of death occasioned by it be the same. *Id.*
40. DEGREES OF MURDER UNDER MAINE STATUTE ILLUSTRATED. *Id.*
41. PHYSICIAN MAY TESTIFY AS EXPERT TO PREGNANCY OF DECEASED, and may give his reasons for his belief, after having made a *post-mortem* examination of the body, on the trial of an indictment for murder caused by an attempt to procure an abortion. *Id.*
42. PHYSICIAN MAY GIVE HIS OPINION OF CAUSE OF DECEDENT'S DEATH, after having made a *post-mortem* examination of the body, on the trial of an indictment for murder caused by an attempt to procure an abortion. *Id.*
43. WHERE DEATH ENSUES IN PURSUIT OF UNLAWFUL DESIGN, without any intention to kill, it will be either murder or manslaughter as the intended offense is felony or only a misdemeanor. *Smith v. State*, 607.
44. PERFORMING OPERATION UPON PREGNANT WOMAN BY HER CONSENT, for the purpose of procuring an abortion, was no offense at common law, unless the woman was quick with child. But by the statute of Maine, it is made equally criminal to produce an abortion before and after quickening, and an unsuccessful attempt to cause the destruction of an unborn child is a crime, whether the child be quick or not. *Id.*
45. TERM "FELONY" INCLUDES EVERY OFFENSE PUNISHABLE WITH DEATH or by imprisonment in the state prison. *Id.*
46. EMPLOYMENT OF ANY INSTRUMENT WITH INTENT TO DESTROY CHILD of which a woman is pregnant, and the destruction of such child, constitute a felony. And if the death of the mother be occasioned by the use of such instrument with such intent, the offense is murder. *Id.*
47. EMPLOYING MEANS WITH INTENT TO PROCURE MISCARRIAGE of a pregnant woman, and the procuring of the miscarriage thereby, constitute a misdemeanor, and if the death of the mother be occasioned by the employment of such means with such intent, the offense will be manslaughter. *Id.*

See JURY AND JURORS, 1, 2, 10-14.

CROPPERS.

See LICENSES, 6.

CROSS-BILLS.

See PARTITION, 5.

DAMAGES.

See CONTRACTS, 9, 10; COVENANTS, 3; DEEDS, 1; EVIDENCE, 2; EXDOUTIONS, 21, 22; HIGHWAYS, 2; INSURANCE—MARINE; LANDLORD AND TENANT; MARRIED WOMEN; MASTER AND SERVANT; PHYSICIANS, 2; RAILROADS, 2, 3; SALES, 5, 6, 9; SHIPPING, 1, 2, 4-6; SPECIFIC PERFORMANCE, 3; TRADE NAMES; TRESPASS, 3, 9; WATERCOURSES, 1.

DAMS.

See PUBLIC LANDS, 3.

DEATH.

See CRIMINAL LAW; NEGLIGENCE, 4; PARTNERSHIP, 4 6; PLEADING AND PRACTICE, 24.

DEBT.

See JUDGMENTS, 34, 35, 42-44.

DECLARATIONS.

See ESTOPPEL, 6; EVIDENCE, 20-25, 27; HIGHWAYS, 2; JUDGMENTS, 42, 43.

DECREEES.

See JUDGMENTS.

DEDICATION.

1. DEDICATOR OF LAND MAY PRESCRIBE TERMS AND LIMITATIONS upon which he gives it. *Hemphill v. City of Boston*, 749.
2. LAND DEDICATED FOR SPECIAL AND LIMITED USE, AS FOR FOOTWAY, must be accepted and used for that purpose only. *Id.*
See HIGHWAYS, 8.

DEEDS.

1. CONSIDERATION IN DEED MAY BE EXPLAINED, CONTROLLED, OR REBUTTED BY PAROL, where the amount paid becomes a material inquiry; as for the purpose of ascertaining the measure of damages for breach of a covenant of seisin. *Swafford v. Whipple*, 498.
2. DEED IS CONCLUSIVE EVIDENCE OF TERMS OF SALE, where there is no allegation of fraud, or that any language not truly expressive of the contract had been inserted in the deed, or that any mistake whatever had been made in writing the same; in such a case parol proof contradicting the deed would not be admissible, even in equity. *Frederick v. Youngblood*, 209.
3. MEANING OF WORDS "BE THE SAME MORE OR LESS," IN DEED, is that the parties should run the risk of gain or loss, and if the quantity proved greater or less than the quantity sold, the parties should abide by their bargain. *Id.*

4. RECORDING OF CONVEYANCE OF REAL ESTATE IN INDIANA is required within ninety days from its execution, be it executed without or within the state. *Doe ex dem. Hosier v. Hall*, 460.
 5. DEED RECORDED IN MINUTES OF COURT, in the course of proceedings instituted to establish the same, is not a registration contemplated by the law. *Beverly v. Burke*, 351.
 6. COPY OF DEED WHEN ESTABLISHED will be treated as the original for all purposes. *Id.*
 7. GRANTOR CAN NOT BE REQUIRED TO EXECUTE SECOND DEED where one previously executed has been lost or destroyed while in the grantee's possession. *Hoddy v. Hoard*, 456.
 8. APPURTENANCE MUST AGREE IN NATURE AND QUALITY with that whereunto it is appurtenant. *Wilcoxon v. McGhee*, 409.
 9. EQUITABLE CLAIM FOUNDED ON UNRECORDED DEED WILL BE ENFORCED IN EQUITY. except against a *bona fide* purchaser without notice. *Price v. McDonald*, 657
 10. TITLE UNDER LOST DEED CAN BE PROVED ONLY BY POSSESSION, adverse, exclusive, uninterrupted, and continued for not less than twenty years. *Marcy v. Stone*, 736.
- See AGENCY, 2; BOUNDARIES; CONSTITUTIONAL LAW, 13; CORPORATIONS, 5; EASEMENTS, 1; EVIDENCE, 8; EXECUTIONS, 20; MORTGAGES, 1, 2; NOTICE, 3; STATUTE OF FRAUDS; VENDOR AND VENDEE, 1, 3.

DEFINITIONS.

1. LAWS ARE EITHER HUMAN OR DIVINE. *Borden v. State*, 217.
 2. DIVINE LAWS are either natural or revealed. *Id.*
 3. NATURAL LAW is "a rule which so necessarily agrees with the nature and state of man that without observing its maxims the peace and happiness of society can never be preserved." *Id.*
 4. ALL RIGHTS OF MAN belong to one of two classes, viz.: 1. Natural rights; 2. Acquired rights. *Id.*
 5. JUSTICE IN JUDICIAL SENSE is nothing more nor less than exact conformity to some obligatory law. *Id.*
- See EASEMENTS, 1, 2; JURISDICTION, 1; LICENSES, 1; NUISANCE, 1, 2.

DELIVERY.

See SPECIFIC PERFORMANCE, 3; VENDOR AND VENDEE, 3.

DEMAND.

See NEGOTIABLE INSTRUMENTS; STATUTE OF LIMITATIONS, 1.

DEMURRER.

See JURY AND JURORS, 4; PLEADING AND PRACTICE, 6, 7.

DESCRIPTIONS.

See BOUNDARIES; CRIMINAL LAW, 4, 24, 36, 38, 39; PUBLIC LANDS, 4.

DESERTION.

See MARRIED WOMEN, 1.

DEVISES.

See EVIDENCE, 26, 27; WILLS, 6.

DISCOVERY.

See EQUITY, 6; USURY, 6.

DISSOLUTION.

See LEJUNCTIONS, 1: PARTNERSHIP, 4, 19.

DIVINE LAWS.

See DEFINITIONS, 2, 3.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOMICILE.

See INFANCY.

DORMANT PARTNERS.

See PARTNERSHIP, 2, 3.

EASEMENTS.

1. EASEMENT IS LIBERTY, PRIVILEGE, OR ADVANTAGE IN LAND, without profit, and existing distinct from the ownership of the soil, and must be founded upon a deed or writing, or upon prescription. It is a permanent interest in another's land, with a right to enjoy it fully and without obstruction. *Hazellon v. Putnam*, 158.
2. EASEMENT OR SERVITUDE IS RIGHT OF ONE PROPRIETOR TO SOME PROFIT, benefit, or beneficial use in the land of another. *Ritger v. Parker*, 744.
3. OWNER OF LAND CAN NOT HAVE EASEMENT IN HIS OWN ESTATE in fee. *Id.*
4. TO EXTINGUISH EASEMENT BY UNITY OF TITLE and possession of the dominant and servient tenements in the same person, such person must have an estate in fee in both tenements. *Id.*
5. RIGHT OF WAY APPURTENANT IS NOT EXTINGUISHED BY MERGER IN MORTGAGE taking possession of the dominant and servient estates under separate mortgages for the purpose of foreclosure, but conveying one of the estates before foreclosure. *Id.*
6. REDEMPTION BY MORTGAGOR OR FORECLOSURE OF MORTGAGE RESTORES OR PASSES ESTATE WITH ALL EASEMENTS, servitudes, and other incidents appertaining to it before the mortgage. *Per Shaw, C. J. Id.*
7. EASEMENT OF OVERFLOWING ADJOINING LANDS is not appurtenant to land, but more properly appertains to something put upon land, as a mill. *Wilcoxon v. McGhee*, 409.
8. RIGHT TO CONTINUE TO OVERFLOW LANDS OF GRANTOR to same extent as when grant was made passes with grant of mill and appurtenances, but not with a grant of the land. *Id.*

See LICENSES, 5.

EJECTMENT.

1. IN EJECTMENT PLAINTIFF CAN NOT RECOVER DIFFERENT ESTATE FROM THAT CLAIMED in his declaration, under the Illinois statute. *Ballance v. Rankin*, 412.

2. PLAINTIFF IN EJECTMENT CLAIMING WHOLE OF PREMISES can not recover undivided interest therein, under the Illinois statute. *Id.*
3. PLAINTIFF IN EJECTMENT CLAIMING UNDIVIDED SHARE can not recover different share, under the Illinois statute. *Id.*
4. PLAINTIFF IN EJECTMENT DECLARING FOR WHOLE, may recover distinct part, under the Illinois statute. *Id.*
5. PLAINTIFF IN EJECTMENT DECLARING FOR UNDIVIDED SHARE may recover same share in any part of the premises, under the Illinois statute. *Id.*
6. JUDGMENT IN EJECTMENT DOES NOT OF ITSELF CHANGE CHARACTER OF POSSESSION held by the defendant in the action, nor does it preclude him from relying on the statute of limitations in a subsequent suit, unless the possession was changed by surrender or by the execution of a writ of possession. *Batterton v. Chiles*, 539.
7. LAND FOR WHICH THERE IS ENFORCEABLE JUDGMENT IN EJECTMENT may be sold while in the adverse possession of the defendant in the action. The law against champerty does not apply to such a case. *Id.*

See PUBLIC LANDS, 8.

ELECTION.

See PAYMENT, 3; TRESPASS, 1.

ELECTIONS.

1. COMMISSIONERS OF ELECTION ARE LIABLE FOR REFUSING TO RECEIVE VOTE from malice and intent to deprive a citizen of his right, or with intent to overawe and control him in its exercise. *Patterson v. D'Auvergne*, 564.
2. CORRECTNESS OF PERFORMANCE OF OFFICIAL DUTY IMPOSED BY LAW UPON EXECUTIVE DEPARTMENT, of opening and comparing votes returned, is not a subject for judicial inquiry. *Dennett, Petitioner*, 602.

ENTIRE CONTRACTS.

See STATUTE OF LIMITATIONS, 4.

EQUITABLE ASSIGNMENTS.

See ASSIGNMENT OF CONTRACTS.

EQUITY.

1. COURT OF EQUITY IS BETTER QUALIFIED THAN COURT OF LAW to examine into the authority or capacity of a party to convey title. *Winter v. Jones*, 379.
2. PROVISIO THAT NEW ACTION MAY BE COMMENCED WITHIN YEAR AFTER REVERSAL, in section 12 of the act of 1838, regulating practice in suits at law in Indiana, if in certain actions judgment be given for plaintiff and afterwards reversed for error, applies to suits in chancery as well as to actions at law; and this, although the reversal be for error for want of jurisdiction. *McKinney v. Springer*, 470.
3. COURTS OF EQUITY WILL REFUSE THEIR ASSISTANCE WHERE THERE HAS BEEN GROSS LACHES or long acquiescence on the part of the party seeking the relief. *Smith v. Thompson*, 126.
4. AFFIDAVIT OF LOSS OF INSTRUMENT IS NECESSARY to sustain a bill in equity seeking relief in cases of such supposed loss. *Hoddy v. Hoard*, 456.

5. IN REPLY TO INTERROGATORY, INDEPENDENT CONTRACT NOT ELICITED BY interrogatory is inadmissible. *Zeigler v. State*, 395.
 6. STRIKING OUT INTERROGATORIES IN BILL FOR DISCOVERY IS NOT ERROR for which a judgment will be reversed, when from the evidence introduced the legal effect is the same as if they had not been stricken out and had been answered. *Byers v. Fowler*, 271.
 7. ANSWER IN EQUITY IS CONCLUSIVE WHEN RESPONSIVE TO BILL, unless contradicted by two witnesses, or one witness and circumstances. *Zeigler v. State*, 395.
- See ASSIGNMENT OF CONTRACTS; BONA FIDE PURCHASERS, 3; CONTRACTS, 3, 5; DEEDS, 9; EXECUTIONS, 4, 13, 14; EXECUTORS AND ADMINISTRATORS, 3, 5; HIGHWAYS, 7; INJUNCTIONS; JUDGMENTS, 27, 28; LICENSES, 4; NOTICE, 2; NUISANCE, 5, 6; PARENT AND CHILD, 1, 2; PARTITION, 2-5; PARTNERSHIP, 5, 7, 10, 13; PLEADING AND PRACTICE, 12, 13; PUBLIC LANDS, 5; SPECIFIC PERFORMANCE; USURY, 6; WILLS, 1, 2, 4, 5.

ERROR.

See EVIDENCE, 3; EXECUTIONS, 7; INSANITY; INSURANCE—FIRE, 9; JURY AND JURORS, 5, 6; PARTITION, 5; PLEADING AND PRACTICE, 7, 11, 18-20.

ESTATES OF DECEDENTS.

See PARTNERSHIP, 5, 8.

ESTOPPEL.

1. COVENANTS OF NON-CLAIM, AND THAT GRANTOR WILL WARRANT and defend the land conveyed by his deed, free from all incumbrances by him made, do not estop the grantor to claim the land under a title subsequently acquired by him. *Partridge v. Patten*, 633.
2. VENDOR OF LAND IS NOT ESTOPPED TO ASSERT TITLE SUBSEQUENTLY ACQUIRED, unless by doing so he is obliged to deny or contradict some fact alleged in his former conveyance. *Id.*
3. ADMISSIONS ACTED ON BY OTHERS ARE CONCLUSIVE against the party making them, in all cases between him and the person whose conduct he has influenced; nor is it material whether the admission is expressly made or is to be inferred from the conduct of a party; and in the operation of this rule, it is unimportant whether the admission is true or false, made fraudulently or innocently, it being the fact of another's having acted on it that renders it conclusive. *McCravey v. Remson*, 194.
4. ONE IS ESTOPPED TO CLAIM TITLE UNDER PAROL GIFT FROM TESTATOR to a slave which he surrendered on demand to an executor and admitted to be a part of the estate, and which he subsequently hired from the executor who had inventoried him as part of the estate, although he acted under a mistake as to his legal rights. *Id.*
5. PERSON CLAIMING TITLE UNDER ONE ESTOPPED IS BOUND by the estoppel, though he claims *bona fide*, unless the estoppel is fraudulent. *Id.*
6. DEFENDANT IN SUIT IS NOT ESTOPPED BY AVERMENTS IN HIS DECLARATION in a former action to which the plaintiff in the present action was neither a party nor privy. But such averments may be used as evidence of his admissions in reference to the present plaintiff's rights, and may be shown by introducing the record in such former suit. *Parsons v. Copeland*, 628.

See TRUSTS AND TRUSTEES.

EVIDENCE.

1. **ONUS PROBANDI LIES UPON PARTY** who seeks to support his action or defense by a particular fact of which he is supposed to be cognizant. *Swafford v. Whipple*, 498.
2. **EVIDENCE UPON INJURIES FOR REDRESS OF WHICH STATUTE HAS PROVIDED** another tribunal is incompetent in an action at law to recover damages for such injuries. *Bassett v. Carleton*, 605.
3. **IT IS NOT ERROR TO ADMIT EVIDENCE WHICH MAY BE MADE COMPETENT** by the introduction of subsequent testimony. *Hamilton v. Summers*, 509.
4. **TRANSCRIPT OF SUIT OF SISTER STATE IS NOT EVIDENCE** of any fact that can only be collected from it by inference. *McCravey v. Remson*, 194.
5. **ORIGINAL FILES AND RECORD OF SUPREME COURT ARE ADMISSIBLE** in evidence to prove that a judgment was rendered in the case. *Paul v. Slason*, 75.
6. **JOURNALS OF LEGISLATURE ARE EVIDENCE** to show that a bank was not chartered by the requisite vote. *Per Perkins, J. Skinner v. Deming*, 463.
7. **REGISTRATION OF BOND FOR TITLE TO LAND** does not entitle it to be received in evidence for any purpose without proof of its execution. *Beverly v. Burke*, 351.
8. **DEED CAN NOT BE READ IN EVIDENCE** without proof of its execution; the same rule applies to a copy of a deed. *Id.*
9. **NO PROOF OF EXECUTION IS REQUIRED OF INSTRUMENT THIRTY YEARS OLD**, when one party holds possession under it and the other party also claims possession under the same instrument. *Id.*
10. **FOUNDATION HAVING BEEN LAID BY PROOF OF LOSS OF WRITTEN INSTRUMENT**, its contents may be proved by explicit oral testimony. *Jones v. Robinson*, 212.
11. **SECONDARY EVIDENCE, AMENDMENT OF DECLARATION.**—If defendant had pleaded to issue on its merits, without taking over of a bond, upon proof of its loss and destruction, secondary evidence may be introduced without any amendment of the declaration, to prove both its execution and its contents. *Id.*
12. **BEFORE SECONDARY EVIDENCE OF CONTENTS OF WRITTEN INSTRUMENT** can be introduced, its loss must be established, or if it is in the possession of the adverse party, he must be notified to produce it. *Id.*
13. **PAROL EVIDENCE OF PRIOR OR CONTEMPORANEOUS CONVERSATIONS, CIRCUMSTANCES, USAGES, etc.**, is inadmissible to contradict, control, or explain an unambiguous written contract. *Glendale Woolen Co. v. P. I. Co.*, 309.
14. **PAROL EVIDENCE IS INADMISSIBLE TO ADD TO, VARY, OR EXPLAIN WRITTEN INSTRUMENT**, as a general rule. *Waddell v. Glassell*, 170.
15. **PAROL EVIDENCE IS ADMISSIBLE TO SHOW FRAUD IN MATERIAL PART OF WRITTEN CONTRACT**; thus where the defendant agreed to deliver the plaintiff cotton of an average quality, and the plaintiff, in reducing the contract to writing, inserted "good fair cotton," as the quality the defendant agreed to deliver, knowing that by a local usage it was superior to the cotton agreed upon, and that the defendant was ignorant of this when he signed the written contract, parol evidence is admissible to show these facts as a defense to the contract. *Id.*

16. PAROL EVIDENCE IS NOT ADMISSIBLE TO ADD TO OR VARY WRITTEN INSTRUMENT; but if it be apparent that the instrument in writing contains but a part of the agreement entered into by the parties, parol proof may be received to prove the entire contract, otherwise the contract could not be brought before the court; but the parts of the agreement proposed to be proved by parol must not be inconsistent with or repugnant to the intention of the parties, as shown by the written instrument. *West v. Kelly*, 192.
17. PAROL EVIDENCE IS NOT ADMISSIBLE TO ALTER PROMISSORY NOTE given to attorneys for professional services to be afterwards rendered in a suit to be instituted, and to show that it was the agreement of the parties that the note was not to be paid unless the attorneys should be successful in the suit they were to bring. *Id.*
18. PAROL EVIDENCE IS ADMISSIBLE TO PROVE FAILURE OF CONSIDERATION, either in whole or in part of a written instrument. *Id.*
19. COURT IS NOT BOUND TO SEPARATE LEGAL FROM ILLEGAL EVIDENCE when both are offered together and as a whole; and if the party offering it does not separate the legal from the illegal testimony, the whole may be rejected. *Id.*
20. DECLARATIONS OF AGENT, to be admissible, must form part of the *res gesta*. *Innis v. Steamer Senator*, 305.
21. MERE NARRATION OF EVENT AFTER IT IS FULLY ENDED does not form part of the *res gesta*. *Id.*
22. PARTY WHOSE DECLARATIONS WERE IMPROPERLY INTRODUCED IN EVIDENCE afterwards takes the stand and testifies in exact accordance with said declarations: *Held*, that the court can not say that their admission resulted unfavorably to the defendant. *Id.*
23. DECLARATIONS AND ADMISSIONS OF PARTY AGAINST HIS INTEREST ARE ADMISSIBLE as evidence against him; but the witness who deposes to such declarations or admissions should give the precise language of the party if he can; if he can not, he should be able to state the substance of them; if he can not undertake to testify to the language, nor to the substance of the admissions, he ought not to be allowed to depose; consequently a witness can not testify who does not propose to state the language nor the substance of the admissions, but merely his understanding of them. *Dennis v. Chapman*, 186.
24. ACTS AND DECLARATIONS OF GRANTEE IN ALLEGED LOST DEED tending to show that no such deed was ever given are admissible to rebut parol evidence raising a presumption of such a deed. *Marcy v. Stone*, 736.
25. DECLARATIONS OF DECEASED OCCUPANT OF LAND, THAT HE OCCUPIED IT AS TENANT of another, are competent evidence, as part of the *res gesta*, to prove the latter's possession. *Id.*
26. WILL IS NOT COMPETENT EVIDENCE OF TESTATOR'S TITLE to land devised thereby, it seems, in favor of one claiming under it, without other proof of title. *Id.*
27. WHERE WILL IS ADMITTED AS ASSERTION OF TITLE BY TESTATRIX to land devised thereby to certain grandchildren, in an action against one claiming through the devisees under an alleged adverse possession begun by the testatrix, her subsequent declarations that she did not own the land and would not buy it except under a certain arrangement, but intended to alter her will, and that if the devisees got the land without such ar-

arrangement they would get more than her other grandchildren, are admissible in rebuttal, together with evidence of the number of grandchildren, and of the decree of distribution under the will showing the amount of their shares. *Id.*

See ATTACHMENTS, 8; CRIMINAL LAW, 21, 23, 35, 36, 39, 41, 42; DEEDS, 1, 2; ESTOPPEL, 6; EXECUTIONS, 7, 26; INSURANCE—FIRE, 6; JUDGMENTS, 13, 39; LIENS, 4; NEGLIGENCE, 1; NEW TRIAL; PARTNERSHIP, 14, 18, 19; PHYSICIANS, 2; PLEADING AND PRACTICE, 4, 14, 15, 25, 26, 28; PUBLIC LANDS, 6; RECORDS; STATUTE OF FRAUDS; SURETYSHIP, 2; TRESPASS, 8; TROVER, 1; USURY, 6; WILLS, 1, 2, 4, 5; WITNESSES.

EXCEPTIONS.

See CRIMINAL LAW, 5, 6; JURY AND JURORS, 7, 9; PLEADING AND PRACTICE, 8, 21, 25.

EXECUTIONS.

1. **JUSTICE OF PEACE CAN NOT ISSUE EXECUTION AGAINST BODY OF DEFENDANT**, under the Illinois statute, upon a judgment founded upon contract before an execution has been returned unsatisfied against his property. *McDonald v. Wilkie*, 423.
2. **PROMISSORY NOTE IS NOT SUBJECT TO LEVY AND SALE** under execution. *Lowremore v. Berry*, 188.
3. **IRREGULARITY IN THAT EXECUTIONS ON WHICH BILL IN NATURE OF CREDITOR'S SUIT IS FOUNDED** were returnable out of term, without an order first obtained for that purpose, will not be noticed by the supreme court; application should be made to the court from which they issued to set them aside. *How v. Kane*, 152.
4. **EACH DEBTOR IN EXECUTION IS LIABLE FOR WHOLE DEBT IN SOLIDO**, and the officer levying the execution is not bound to regard any equities subsisting between the debtors themselves, or between the debtors and their other creditors. *Warren v. Edgerton*, 66.
5. **OFFICER ABOUT TO LEVY EXECUTION UPON LAND OF ONE OF SEVERAL DEBTORS** in execution, is not bound to regard such debtor's offer to expose to him the personal property of his co-debtors and to indemnify him for levying the execution upon such personal property. *Id.*
6. **WHERE OFFICER HAVING EXECUTION AGAINST SEVERAL DEBTORS LEVIES IT UPON LAND** of one of them, although such debtor offered to expose to him the personal property of his co-debtors, the debtor whose land is so levied upon can not maintain an action against the officer for levying upon the land, or for falsely returning that the execution debtors had neglected to expose personal property sufficient to satisfy the execution. *Id.*
7. **COUNTY COURT HAS NO POWER TO PERMIT SHERIFF TO AMEND** his return upon an execution, which he has returned to the clerk's office, for the purpose of making such execution competent evidence in a case on trial. But its judgment will not be reversed for such error where it is evident that the result of the trial was not in any way affected by it. *Paul v. Slason*, 75.
8. **WHERE BIDDING AT EXECUTION SALE IS PREVENTED** on account of a request made by the execution defendant of those present that they refrain from bidding, and the property is purchased in for the benefit of the defend-

ant, the sale is fraudulent as to creditors, and a purchaser from the vendee with notice occupies no better position than his vendor. *Byers v. Fowler*, 271.

9. POSTING NOTICE ON DEBTOR'S SHOP DOOR IS NOT SUFFICIENT NOTICE to him of execution sale. The notice must be served on him, or be left at his residence in proper hands. *Richards v. Meeks*, 49.
10. ONE PURCHASING FOR ANOTHER AT EXECUTION SALE, having agreed to so purchase, and hold the property as security for the money, is a trustee, and the contract is a mortgage. *Mofatt v. Buchanan*, 41.
11. BONA FIDE PURCHASER AT SHERIFF'S SALE WILL HOLD LAND where the judgment creditor had conveyed it away previously to the judgment against him, but the deed had not been put upon record within the time required by statute, nor prior to the recording of the sheriff's deed. *Doc ex dem. Hosier v. Hall*, 460.
12. PURCHASER AT SHERIFF'S SALE STANDS, IN RELATION TO REGISTRATION LAW, as though he were a purchaser at the same date from the execution defendant himself. *Id.*
13. PURCHASER AT EXECUTION SALE CAN NOT HAVE REDEMPTION OF PROPERTY SET ASIDE in equity on the ground of fraud while still retaining the redemption money. *Merry v. Bostwick*, 434.
14. CREDITOR HAVING TWO JUDGMENTS ACQUIRES NO INTEREST AGAINST CREDITOR who has redeemed the property from the sale under the senior judgment, by a purchase of the same property at a sale under the junior judgment, made before the time expires for redemption under the senior judgment by the judgment debtor. He does not thereby acquire the judgment debtor's equity. *Id.*
15. JUDGMENT DEBTOR'S RIGHT TO REDEEM PROPERTY SOLD ON EXECUTION can not be sold under execution. *Id.*
16. LACHES, IN ASSERTING CLAIM when unexplained, is a good defense to a suit to redeem, as the hazard of injustice to others in calling for accounts of hires and profits is too great. *West v. Thornton*, 134.
17. PURCHASER AT EXECUTION SALE IS NOT AFFECTED BY IRREGULARITIES of the sheriff in the sale and his failure to observe all the requisites prescribed by the statute; the requisites prescribed by the statute in respect to the mode of proceeding under an execution are merely directory to the officer, and in no case can the purchaser be the sufferer by an omission to observe them, unless he can be shown to have been cognizant of that fact. *Byers v. Fowler*, 271.
18. ATTORNEY OF RECORD PURCHASING AT EXECUTION SALE IS NOT BOUND TO TAKE NOTICE of irregularities of the sheriff, and his title is not affected by the existence of irregularities of which he had no notice. *Id.*
19. SALE BY MARSHAL OF LAND LEVIED ON BY PREDECESSOR under a judgment of the circuit court of the United States, after his term of office had expired, but under a writ which had come into his hands during his continuance in office, is irregular, and upon a direct application to the court by any of the parties interested it would be set aside, but such an irregularity at most would only render the sale voidable, and it could not be assailed in a collateral proceeding. *Id.*
20. WHERE MARSHAL WHO SOLD LAND UNDER JUDGMENT OF CIRCUIT COURT OF UNITED STATES IS REMOVED, the court may, upon a proper showing, order his successor to execute and acknowledge the deed, and the act of

congress adopting the execution law of this state clearly authorizes its record in the county where the land is situated when so acknowledged. *Id.*

21. AMOUNT OF EXECUTION IS PRIMA FACIE MEASURE OF DAMAGES AGAINST SHERIFF, who, through mere neglect, fails to collect the money on it or to return it; and the damages can not be mitigated by merely showing that the original debtor was solvent and able to pay. *Evans v. Governor*, 172.
22. IF, AFTER NEGLECT OF SHERIFF TO COLLECT MONEY ON WRIT OR TO RETURN IT, the plaintiff should cause subsequent executions, upon which the succeeding sheriff could have made the money, to be returned to await his remedy against the prior sheriff for the default, this constitutes no bar to his action for such default, and does not reduce the damages. *Id.*
23. SHERIFF MAY SELL AFTER RETURN DAY OF WRIT personalty levied on while the execution was in full force. *Id.*
24. CONSTABLE IS PROTECTED IN EXECUTION OF PROCESS OF JUSTICE OF PEACE which shows upon its face that the justice had jurisdiction of the subject-matter, when nothing appears to apprise him that he had not jurisdiction also of the person. *McDonald v. Wilkie*, 423.
25. SHERIFF BY LEVY ON PERSONAL PROPERTY ACQUIRES SUCH POSSESSION thereof as enables him to maintain trover for its conversion while in his possession; and if he has made a proper levy, but permits the property to remain in the hands of a bailee on a verbal undertaking to have it forthcoming on the day of sale, his possession continues so as to entitle him to maintain the action against such bailee who has converted it to his own use. *Williams v. Herndon*, 551.
26. RETURN OF SHERIFF THAT HE HAD LEVIED EXECUTION ON PROPERTY, made by him before the commencement of the suit, is admissible evidence in an action of trover brought by him, to prove that he made such a levy as vested the possession in him. *Id.*

See ATTACHMENTS, 1, 9; BONA FIDE PURCHASERS, 3; JUDGMENTS, 13, 34-36; REPLEVIN; SURETYSHIP, 3, 4; TRESPASS, 7.

EXECUTORS AND ADMINISTRATORS.

1. MORAL FITNESS OF PERSON APPOINTED EXECUTOR BY WILL can not be inquired into by the court to which he applies for permission to qualify. *Berry v. Hamilton*, 515.
2. EXECUTOR DERIVES HIS OFFICE FROM TESTAMENTARY APPOINTMENT, and if he is a person not disqualified by law from being an executor, the court has no right to refuse to permit him to qualify or to refuse to grant him letters testamentary. *Id.*
3. EXECUTOR CAN NOT MAINTAIN SUIT IN EQUITY TO COMPEL CO-EXECUTOR TO ACCOUNT for and pay over to him or into court certain claims alleged to be due from defendant to the testator's estate. *Beall v. Hilliary*, 649.
4. AT COMMON LAW DEBT DUE FROM EXECUTOR TO TESTATOR was considered paid and was assets in the hands of the executor, for which he was as much answerable to the creditors of the testator as if he had actually received that amount in cash from any other person indebted to the estate. *Id.*

6. EXECUTOR IS ACCOUNTABLE IN EQUITY FOR AMOUNT OF HIS DEBT as assets, not only for the payment of debts, but also for the benefit of residuary legatees. *Id.*
 8. EXECUTORS ARE NOT LIABLE TO EACH OTHER, but each to the *cestis que trust* to the full extent of the funds he receives. *Id.*
 7. ONE EXECUTOR PAYING OVER TO OTHER WHOLE OF ASSETS IN HIS HANDS will not be thereby exonerated from his responsibility to the creditors and others entitled to the estate of the deceased. *Id.*
 8. RIGHTS OF ONE EXECUTOR ARE FULLY EQUAL TO THOSE OF OTHER in regard to receiving, holding, and disbursing the assets. *Id.*
 9. EXECUTOR WHO HAS PAID AMOUNT OF DECREE IS ENTITLED TO DEMAND of his co-executor so much of the decree as he was rightfully bound to pay. *Id.*
 10. UNAUTHORIZED SALE OF PROPERTY BY ADMINISTRATOR OF ESTATE is treated as his individual act. *Worthy v. Johnson*, 393.
- See ADVERSE POSSESSION, 2; ESTOPPEL, 4; JUDGMENTS, 4; NEGOTIABLE INSTRUMENTS, 20; PARTNERSHIP, 4, 5, 18; PLEADING AND PRACTICE, 24; STATUTE OF LIMITATIONS, 5.

EXEMPTIONS.

See COMMON CARRIERS; TAXATION, 3.

EXPERTS.

See WITNESSES, 41, 42.

FACTORS.

See AGENCY, 5; BANKRUPTCY AND INSOLVENCY, 3.

FALSE IMPRISONMENT.

See CRIMINAL LAW, 13-20.

FEDERAL COURTS.

See CRIMINAL LAW, 5; EXECUTIONS, 19, 20; JUDGMENTS, 23, 25, 26; JURISDICTION, 6.

FELONIES.

See CRIMINAL LAW.

FENCES.

See RAILROADS.

FERRIES.

See LANDLORD AND TENANT.

FISHERY.

See WATERCOURSES.

FORECLOSURE.

See EASEMENTS, 5, 6.

FOREIGN ASSIGNMENTS.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS.

FOREIGN BANKRUPT LAWS.

See BANKRUPTCY AND INSOLVENCY, 3, 4.

FOREIGN CORPORATIONS.

See CORPORATIONS, 2.

FOREIGN JUDGMENTS.

See JUDGMENTS, 42-45.

FOREIGN RECORDS.

See EVIDENCE, 4.

FOREIGN STATUTES.

See STATUTES, 1, 2.

FORFEITURES.

See CONSTITUTIONAL LAW, 12.

FORMER CONVICTION.

See CRIMINAL LAW, 9, 10.

FRAUD.

See CRIMINAL LAW, 9; DEEDS, 2; ESTOPPEL, 5; EVIDENCE, 15; FRAUDULENT CONVEYANCES; JUDGMENTS, 36; LICENSES, 7; PAYMENT, 1; SALES, 7.

FRAUDULENT CONVEYANCES.

CONVEYANCE TO DEFRAUD CREDITORS MADE TO CREDITOR OF VENDOR under suspicious circumstances is not relieved from the taint of fraud, by being made ostensibly in discharge of the debt. *Merry v. Boswick*, 434.

See BONA FIDE PURCHASERS, 3; EXECUTIONS, 8; PARTNERSHIP, 12, 13.

GARNISHMENT.

See ATTACHMENTS, 3-11, 37-39.

GENERAL ISSUE.

See PLEADING AND PRACTICE, 14; TRESPASS, 6.

GIFTS.

See ESTOPPEL, 4.

GRAND JURORS.

See CRIMINAL LAW, 2; JURY AND JURORS, 12, 14.

GRANTS.

See PUBLIC LANDS; WATERCOURSES, 3

GROWING TREES.

See LIENS.

GUARANTY.

1. **CONSIDERATION OF NOTE AND GUARANTY.**—Guaranty of note and the note itself given for the purchase price of real estate, to an agent of the owner who had no authority to convey, are void for want of consideration. *Fisher v. Salmon*, 297.
2. **CONSIDERATION OF NOTE OR GUARANTY MAY BE INQUIRED INTO** between the original parties. *Id.*

GUARDIAN AD LITEM.

See **INSANITY**, 2, 3, 5.

HIGHWAYS.

1. **PERSON INJURED BY OBSTRUCTION IN STREET CAN NOT COMPLAIN**, but takes the risk upon himself where he knows of such obstruction, and attempts to pass it, but can not see it in consequence of the darkness of night, or of the rise of water over the street. *Mt. Vernon Soc. v. Duesouhett*, 467.
2. **DECLARATION IN SUIT FOR SPECIAL DAMAGE RECEIVED BY RIDING AGAINST PUBLIC NUISANCE IN STREET** must show that there was no fault on the plaintiff's part. It does not follow that because such damage has been received a suit for the injury can be maintained, even against the person who put such nuisance in the street. *Id.*
3. **WHEN LAND IS CONVEYED AS BOUNDED BY STREET REPRESENTED ON PLAN** but not yet made, the soil of the contemplated street, though owned by the grantor, does not pass by the conveyance. *Palmer v. Dougherty*, 636.
4. **GRANT OF LAND BOUNDED BY HIGHWAY GENERALLY** carries the fee to the center of the way, if the title of the grantor extends so far. *Id.*
5. **INJUNCTION WILL BE GRANTED TO RESTRAIN ANY OBSTRUCTION** which denies the exercise and use of right of way over a street to which complainant is entitled, as it works irreparable mischief to the street as a street. *White v. Flannigan*, 668.
6. **IRREPARABLE INJURY MAY FOLLOW FROM OBSTRUCTION OF CITY STREET** which would not ensue in case of a country road. The nature of a right sought to be protected by injunction should be kept in view. *Id.*
7. **ACTS OF MARYLAND ASSEMBLY RELATIVE TO POWER OF MUNICIPAL AUTHORITIES OF BALTIMORE** to open streets do not entitle one as a matter of right to have a particular street opened by direction of corporate authorities, and therefore it can not be urged that a bill for such relief is not maintainable in equity, because complainant has a remedy with the municipal authorities. *Id.*
8. **PERSON USING LAND DEDICATED FOR FOOTWAY AS CARRIAGE-WAY** can not recover against the city for an injury to his horse by an obstruction therein, though he uses ordinary care and skill in driving along the way, whether the dedication has been accepted or not. *Hemphill v. City of Boston*, 749.

See **BOUNDARIES**, 9; **CORPORATIONS**, 1; **COVENANTS**, 1; **DEDICATION**, 2; **INJUNCTIONS**, 5; **NEGLIGENCE**, 2, 3; **TRESPASS**, 2; **WATERCOURSES**, 2.

HOMICIDE.

See **CRIMINAL LAW**.

HUMAN LAWS.

See DEFINITIONS, 1.

HUSBAND AND WIFE.

1. HUSBAND IS LIABLE ONLY FOR WIFE'S NECESSARIES in the absence of an express or implied promise on his part to pay her debts. *Johnson v. Williams*, 491.
 2. SERVICES RENDERED IN PROCURING DIVORCE FOR WIFE ARE NOT NECESSARIES, and the husband is not liable for them as such. *Id.*
 3. HUSBAND CAN CONVEY NO GREATER INTEREST IN REAL ESTATE OF WIFE than he himself possesses. *Howey v. Goings*, 427.
 4. HUSBAND'S INTEREST IN WIFE'S ESTATE IS TERMINATED BY DIVORCE A VINCULO. *Id.*
 5. HUSBAND'S DISCHARGE OF CAUSE OF ACTION IS BAR to an action for tort brought in the joint names of husband and wife. *Ballard v. Russell*, 620.
- See MARRIAGE AND DIVORCE; MARRIED WOMEN.

ILLEGAL CONTRACTS.

See SPECIFIC PERFORMANCE, 1, 2.

IMPLIED CONTRACTS.

See CONTRACTS, 7-11.

IMPLIED COVENANTS.

See COVENANTS, 1.

IMPLIED WARRANTY.

See SALES.

IMPRISONMENT.

See TRESPASS, 7.

IMPROVEMENTS.

See BONA FIDE PURCHASERS, 1, 2; CORPORATIONS, 10; LICENSES, 4, 6, 7; PARTITION, 5, 6; PUBLIC LANDS, 10; TRESPASS, 9.

INCUMBRANCES.

See ESTOPPEL, 1; NOTICE, 3.

INDEMNITY.

See EXECUTIONS, 5; INSURANCE—FIRE, 1; USURY, 3.

INDICTMENTS.

See CRIMINAL LAW; OFFICES AND OFFICERS, 1.

INDORSEMENTS.

See NEGOTIABLE INSTRUMENTS; STATUTE OF LIMITATIONS, 1.

INFANCY.

1. REMOVAL OF INFANT WITH INTENT TO RETURN does not change his domicile. *Allen, Adm'r, v. Thomason*, 55.

2. DOMICILE OF INFANT WHILE TRAVELING, or temporarily away from his birthplace, is still his birthplace. *Id.*
3. DOMICILE OF INFANT IS PLACE OF HIS BIRTH, if it were at the time the domicile of his parents. *Id.*
4. INFANT CAN NOT ACQUIRE NEW DOMICILE BY HIS OWN ACT. *Id.*
5. INFANT'S DOMICILE FOLLOWS DOMICILE OF HIS PARENTS. *Id.*
6. INFANT'S DOMICILE CAN NOT BE CHANGED BY MOTHER AND STEP-FATHER removing to another state and taking the infant with them. *Id.*

See PARENT AND CHILD; STATUTE OF LIMITATIONS, 5.

INJUNCTIONS.

1. PLA OF LIMITATIONS RELIED ON IN ANSWER is not available on a motion to dissolve an injunction. *White v. Flannigan*, 668.
2. IT IS SUFFICIENT AVERMENT THAT INJURY IS IRREPARABLE in a bill for injunction to allege that the obstruction complained of works to complainant's great injury and in manifest violation of the obligations of the party against whom injunction is sought. *Id.*
3. SUFFICIENT FACTS MUST BE STATED IN BILL FOR INJUNCTION to restrain irreparable injury to show that such injury will result from the act complained of. *Id.*
4. COMPLAINANT MUST ALLEGE IN BILL FOR INJUNCTION AGAINST OBSTRUCTIONS TO USE of his property, that he uses such property, and that such use has been interfered with. *Id.*
5. EQUITY CAN NOT ENJOIN ONE FROM EXERCISE OF RIGHT, which belongs to him in common with other owners of property in a city, of applying to the city authorities to open a street, he not having bound himself by any contract not to do so. *Id.*
6. INJUNCTION WILL BE GRANTED AGAINST TRESPASS producing mischief which reaches to the very substance and value of the estate, and goes to the destruction of it in the character in which it is enjoyed. *Id.*
7. INJUNCTION AGAINST PROCEEDINGS UNDER JUDGMENT IN ONE STATE, obtained upon a judgment in another state which has subsequently been reversed, will be granted when the defendant is guilty of no laches in the assertion of his rights. *McJilton v. Love*, 449.

See HIGHWAYS, 5-7; NUISANCE, 5, 6.

INSANITY.

1. JUDGMENT MAY, BY COMMON LAW, BE RENDERED AGAINST ONE NON COMPOS MENTIS, upon contracts or liabilities by which he is legally bound. *King v. Robinson*, 614.
2. APPOINTMENT OF GUARDIAN AD LITEM FOR PERSON NON COMPOS MENTIS, rests in the discretion of the court. *Id.*
3. PLAINTIFF IS NOT BOUND TO ASCERTAIN MENTAL CAPACITY OF DEFENDANT, and to bring it before the court, in order that a guardian *ad litem* may be appointed. *Id.*
4. CONTRACT OR LIABILITY ASSUMED BY PERSON WHILE OF SOUND MIND may be enforced against him when he is of unsound mind. *Id.*
5. PERSON OF UNSOUND MIND, OF FULL AGE, MUST APPEAR BY ATTORNEY, and not by guardian; and therefore it can not be alleged as error, in a

proceeding to reverse a judgment rendered against such person, that no guardian had been appointed for him. *Id.*

See WILLS, 4, 5.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INSTRUCTIONS.

See CRIMINAL LAW, 27; INSURANCE—FIRE, 9; JURY AND JURORS, 6, 7, 9; PLEADING AND PRACTICE, 5.

INSURANCE—FIRE.

1. INSURANCE CONTRACT IS ONE OF INDEMNITY UPON TERMS and conditions specified in the policy, and unless those terms are complied with, the assured can not recover. *Glendale Woolen Co. v. P. I. Co.*, 309.
2. DISTINCTION BETWEEN REPRESENTATION AND WARRANTY IN INSURANCE CONTRACT is that the former precedes and is not part of the contract, and need be only materially true; while the latter is part of the contract, and must be strictly fulfilled or the policy is void. *Id.*
3. WHETHER REPRESENTATION IN SURVEY PRECEDING FIRE POLICY is to be regarded as a technical warranty, though referred to in the policy, is doubtful; but if a condition of the policy makes the survey a warranty, then it is so. *Id.*
4. REPRESENTATION IN SURVEY PRECEDING FIRE POLICY THAT "THERE IS A WATCHMAN NIGHTS—no clock—bell is struck every hour," in answer to the questions, "Is there a watchman, etc., during the night?" and, "Is there a good watch-clock?" where, by the conditions of the policy, the survey is made a warranty, amounts to an exact engagement that the insured will keep a watchman upon the premises through the hours of every night, and a breach of such engagement, by having no watchman on duty between Saturday night at twelve o'clock and daylight on Sunday morning, during which a loss occurs, avoids the policy, and precludes a recovery. *Id.*
5. WORD "DURING" MUST BE CONSTRUED with reference to the subject-matter, as meaning either some time within a certain period or as including the whole of such period. The latter is the proper construction, when an applicant for insurance is asked whether there is a watchman on the premises "during the night." *Id.*
6. EVIDENCE OF USAGE IN PARTICULAR MILL OR LOCALITY, as to keeping a watchman during Sunday in manufacturing establishments, is inadmissible to control an insurance policy not ambiguous. *Id.*
7. STATEMENT IN APPLICATION FOR INSURANCE THAT CASK OF WATER IS KEPT in the third story of the building insured is prospective and in the nature of a representation and not a warranty, under a policy providing that if the "representations" in the application "do not contain a just, full, and true exposition of all the facts," etc., and "are material," the policy shall be void. *Jones Manf. Co. v. Manf'rs M. F. I. Co.*, 742.
8. FALSITY OF REPRESENTATION IN APPLICATION FOR POLICY IS MATTER OF DEFENSE, and the burden of proof is on the insurers where the application represents that a cask of water is kept in the insured building and

the insurers seek to avoid the policy because this representation is untrue. *Id.*

2. **REFUSAL TO INSTRUCT AS TO EFFECT OF PART OF ALTERATION OF INSURED PREMISES**, where an instruction is given as to the effect of the entire alteration, which consists of but a single change, is not error; as where the alteration consisted in changing the position of a stove and stove-pipe, and the court refused to instruct the jury, as requested, that if the change of the stove-pipe materially increased the risk, the policy was void, but did instruct them that such would be the effect if the alteration of the stove and pipe materially increased the risk. *Id.*

See MORTGAGES, 4, 5; TAXATION, 3.

INSURANCE—MARINE.

INSURERS INDEMNIFYING SHIP-OWNERS AGAINST PERILS OF SEA are bound to indemnify them for the amount they were obliged to pay the owners of another vessel for damages done the latter by a collision in consequence of the negligent navigation of the insured ship. *Nelson v. Suffolk Ins. Co.*, 770.

See TAXATION, 3.

INTEREST.

1. **INTEREST HOW CALCULATED IN CASE OF PARTIAL PAYMENTS**.—When the payment exceeds the interest due, calculate interest on the principal up to the date of payment, add this interest to the principal, and then deduct the payment. If the payment falls short of the interest due, calculate the interest on the principal up to the time when the payments will overrun the interest due on the principal, and then deduct the payment. *Huner v. Doolittle*, 489.
2. **INTEREST MAY BE GIVEN FOR VEXATIOUS DELAY OF PAYMENT**, under the statute. *McKinney v. Springer*, 470.

See COVENANTS, 3; USURY.

INTERROGATORIES.

See EQUITY, 5, 6; USURY, 6.

INTOXICATING LIQUORS.

1. **ACT OF 1851, FOR SUPPRESSION OF DRINKING-HOUSES AND TIPLING-SHOPS**, does not prevent any person from acquiring or possessing spirituous liquors, except for the uses and purposes therein prohibited, but on the contrary, recognizes them as subjects of property when kept for medicinal or mechanical purposes. *Preston v. Drew*, 639.
2. **PROHIBITION TO SELL INTOXICATING LIQUORS** can not prevent any person from acquiring and possessing them for his own use without any intention to sell them, nor prevent them from being transported from one town or city to another, or through the state, when there is no intention to make sale of them. *Id.*

See CONSTITUTIONAL LAW, 12; CRIMINAL LAW, 21.

JOINDER OF ACTIONS.

See CO-TENANCY, 1.

JOINT TENANT.

See TROVER, 4, 5.

JOURNALS.

See EVIDENCE, 6.

JUDGMENTS.

1. TERRITORIAL COURTS OF WISCONSIN WERE IN EXISTENCE, and judgments could be rendered by them, after the adoption of the state constitution, and before its approval by congress and admission of the territory as a state. *How v. Kane*, 152.
2. POWER TO CONFESS JUDGMENT GIVEN BY DEFENDANT TO PLAINTIFF'S ATTORNEY is a power coupled with an interest, and is irrevocable. *Wassell v. Reardon*, 245.
3. AUTHORITY TO CONFESS DECREE UNDER POWER OF ATTORNEY NOT EXHAUSTED by a confession when the decree was reversed; and a second confession may be made under the power. *Huner v. Doolittle*, 489.
4. DECREE NUNO PRO TUNC AGAINST ADMINISTRATORS IS NOT AUTHORIZED where the memoranda upon which the decree was rendered show but few of the facts upon which a regular decree of the orphans' court could be based. *Metcalf v. Metcalf*, 190.
5. JUSTICE'S JUDGMENT MUST BE AUTHENTICATED BY SOME RECORD, and no effect can be given to one never actually entered. *Benaway v. Bond*, 147.
6. COURT OF STATE HAS NO JURISDICTION TO RENDER JUDGMENT against a party when neither he nor any property of his has been found within the state. *Lovejoy v. Albee*, 630.
7. WHERE PARTY TO SUIT IS NOT WITHIN JURISDICTION OF COURT, a judgment rendered against him will be effectual only as a judgment *in rem*, acting upon such property as he may have within the jurisdiction. *Id.*
8. JUDGMENT RENDERED BY COURT WITHOUT OBTAINING JURISDICTION, either of the person or property of the defendant, is merely void. *Id.*
9. NO JUDGMENT CAN BE RENDERED AGAINST ONE AS TRUSTEE, where neither he nor the principal defendant resides within the jurisdiction, and no property of such defendant has been found here. This was the principle of the common law in force in this state, and it has not been changed by any statute. *Id.*
10. STATUTE PROVIDING THAT JUDGMENT MAY BE RENDERED AGAINST ONE SUMMONED AS TRUSTEE, although he has never been an inhabitant of this state, applies only to cases in which the court has jurisdiction of the suit between the principal parties. *Id.*
11. JUDGMENT OF COURT HAVING NO JURISDICTION IS VOID. *Kenney v. Greer*, 439.
12. WHEN JUDGMENTS OF SUPERIOR COURTS ARE DRAWN COLLATERALLY IN QUESTION, and it appears on the face of them that the court had jurisdiction of the subject-matter, such proceedings are voidable only, although there may be obvious errors. *Borden v. State*, 217.
13. NOTICE BEFORE JUDGMENT.—A claim was presented in probate court without notice to adverse party, and ordered paid by said court. Sheriff was sued for failure to execute a *f. fa.* issued upon said order, and upon plea

- of nul tiel record*, plaintiff introduced in evidence said order of payment. *Held*, that it was properly admitted, and that jurisdiction of the subject-matter appearing upon the face of said proceedings, the court would not inquire into them collaterally. *Id.*
14. PREVIOUS DECISIONS OF THIS COURT AS TO ABSOLUTE NULLITY of the judgments of superior courts when the record fails affirmatively to show previous notice, express or implied, to the defendant, will no longer be regarded as law. *Id.*
 15. WHETHER THERE HAS BEEN NOTICE OR NO NOTICE before judicial sentence relates not to the investiture of judicial power, but its rightful exercise. *Id.*
 16. NOTICE BEFORE JUDICIAL SENTENCE has not been consecrated by the common law as a law of nature. *Id.*
 17. JUDGMENT OF OUTLAWRY was conclusive at common law, and the party could not be heard to prove that he was not outlawed. *Id.*
 18. IDEA THAT JUDICIAL SENTENCE WAS NULLITY had no place in the ancient common law. *Id.*
 19. THERE MAY BE LAW PARAMOUNT TO LAW OF NOTICE BEFORE JUDICIAL SENTENCE. *Id.*
 20. JUDGMENT OF SUPERIOR COURT IS NOT VOID, but only voidable by plea in error. *Id.*
 21. WHILE RULE THAT JUDGMENT RENDERED WITHOUT NOTICE IS NOT VOID may be a very general one, it does not embrace every description of case that might possibly arise, as if a circuit court should assume jurisdiction of a case committed by law exclusively to a probate court, or a judgment might even be void under some circumstances from some peculiar and inflexible policy of the law for the protection of infants, married women, idiots, or lunatics. *Id.*
 22. RULE THAT JUDGMENT OF SUPERIOR COURT IS NOT VOID, BUT VOIDABLE, besides being supported by authority, is supported by a legitimate process of reasoning, predicated upon the foundation, that among the powers vested by law in these courts is the power to decide upon their own jurisdiction. *Id.*
 23. RETURN OF SERVICE OF SUMMONS FAILING TO STATE that it was left at the usual place of abode of the defendant, as required by statute, does not render absolutely void a judgment of the circuit court of the United States. *Byers v. Fowler*, 271.
 24. CONTRACT BECOMES MERGED IN AND EXTINGUISHED BY JUDGMENT OBTAINED THEREON. *Pike v. McDonald*, 597.
 25. LIEN OF JUDGMENT OF CIRCUIT COURT OF UNITED STATES extends throughout the state, and is not confined to the county in which the court is situated. *Byers v. Fowler*, 271.
 26. LIEN OF JUDGMENT OF CIRCUIT COURT OF UNITED STATES throughout a state does not depend upon the adoption by congress of the state law, but it exists prior to and independent of such adoption. *Id.*
 27. JUDGMENT CONTRARY TO EQUITY WILL NOT BE RELIEVED AGAINST BY COURT OF CHANCERY, where a defense existed which might have been set up at law, unless the failure to so set it up was unmingled with fault or negligence on the defendant's part. *Skinner v. Deming*, 463.
 28. IGNORANCE MERELY OF DEFENSE FURNISHES NO EXCUSE FOR EQUITABLE INTERPOSITION by defendant against a judgment at law. *Id.*

39. REVERSAL OF JUDGMENT RESTORES PARTIES TO THEIR ORIGINAL RIGHTS, so far as this can be done without prejudice to third persons. *McJilton v. Love*, 449.
40. PLAINTIFF HAVING RECEIVED BENEFIT FROM JUDGMENT AFTERWARDS REVERSED must make as full restitution to the defendant as the circumstances of the case will permit, and the defendant will have his appropriate action against him. *Id.*
41. RIGHTS OF THIRD PERSONS ARE NOT AFFECTED BY REVERSAL OF JUDGMENT, or their title to property acquired under the erroneous judgment divested. *Id.*
42. DEFENDANT MUST LOOK TO PLAINTIFF ONLY FOR REDRESS in case of reversal of a judgment under which, prior to reversal, third persons' rights have become involved. *Id.*
43. JOINT JUDGMENT IN FAVOR OF SEVERAL DEFENDANTS, if erroneous as to one, will be reversed as to all. *McDonald v. Wilkie*, 423.
44. ACTION OF DEBT WILL NOT LIE ON JUDGMENT which appears of record to be satisfied by levy of execution upon real estate, regular upon the face of it. The record must be held conclusive until, by some proceeding brought to operate directly upon the record itself, the levy is avoided. *Pratt v. Jones*, 80.
45. WHERE, IN ACTION OF DEBT ON JUDGMENT, DEFENDANT PLEADS SATISFACTION of the judgment by a levy thereunder by the plaintiff, and the plaintiff in reply merely traverses this plea, the issue so raised does not involve any inquiry as to the validity of the levy, but only whether the execution appeared of record to be satisfied. *Id.*
46. PURCHASERS UNDER JUDGMENT ARE ENTITLED TO ALL RIGHTS OF JUDGMENT CREDITOR against the defendant and those who fraudulently purchased his property at a prior execution sale against him for his benefit. *Byers v. Fowler*, 271.
47. ASSIGNEE OF JUDGMENT MUST FIRST SHOW that he is entitled to control the judgment, before he can have a summons of garnishment issued thereon. *Dugas v. Mathews*, 361.
48. TRANSFEREE OF NEGOTIABLE NOTE upon which a judgment is founded, pending the suit thereon, acquires by the transfer such an interest or property in the judgment as will enable him to sue out and maintain a proceeding by garnishment. *Id.*
49. INTELLIGIBLE WRITTEN EVIDENCE THAT JUDGMENT is the property of him who claims to be its assignee will be sufficient, in the absence of a formal deed of assignment, to enable him to sue out process of garnishment thereon. *Id.*
50. ASSIGNEE OF JUDGMENT TAKES IT SUBJECT TO ALL EQUITIES subsisting between the original parties, and is not entitled to protection as *bona fide* purchaser under an erroneous judgment. *McJilton v. Love*, 449.
51. TRANSFER OF JUDGMENT DOES NOT VEST LEGAL INTEREST IN ASSIGNEE, but, as it is a mere chose in action, the beneficial interest only passes. *Id.*
52. JUDGMENT IS SHOWN SUBSTANTIALLY TO HAVE BEEN RENDERED BY COURT OF RECORD of another state by a declaration in debt on such judgment, in the ordinary form in debt on a domestic judgment of a court of record, describing the judgment, and saying, "as by the record and proceedings thereof remaining in said court fully appears," etc. *Davis v. Lane*, 458.

43. GROUND FOR PLEA OF NIL DEBIT NOT FURNISHED, because a declaration in debt on a judgment of another state did not show that the court had jurisdiction of the person of the defendant. *Id.*
 44. NIL DEBIT CAN NOT BE PLEADED TO SUIT ON JUDGMENT of a court of another state. *Id.*
 45. COURTS OF ONE STATE ARE BOUND TO GIVE SAME FAITH AND CREDIT to judicial proceedings had in a sister state that are by law or usage given to them in the courts of that state. *McJilton v. Love*, 449.
- See ATTACHMENTS, 5-7, 11; ATTORNEY AND CLIENT, 5; BANKRUPTCY AND INSOLVENCY, 2; BONA FIDE PURCHASERS, 3; CRIMINAL LAW, 3; EJECTMENT, 6, 7; EQUITY, 2, 6; EVIDENCE, 5; EXCUTIONS, 7, 19, 20; EXECUTORS AND ADMINISTRATORS, 9; INJUNCTIONS, 7; INSANITY, 1, 5; JURISDICTION, 6, 9; NEGOTIABLE INSTRUMENTS, 2; PARTNERSHIP, 1-3, 18; PLEADING AND PRACTICE, 18, 19, 22-25; STATUTE OF LIMITATIONS, 7; SURETYSHIP, 1; TRESPASS, 1.

JURISDICTION.

1. JURISDICTION "IS AUTHORITY OR POWER which a man hath to do justice in causes of complaint brought before him." *Borden v. State*, 217.
 2. COURTS OF STATE HAVE NO JURISDICTION BEYOND ITS SOVEREIGNTY. *Lovejoy v. Albee*, 630.
 3. DISTINCTION BETWEEN COURTS OF SUPERIOR AND OF INFERIOR JURISDICTION stated. *Borden v. State*, 217.
 4. NOTHING IS INTENDED TO BE OUT OF JURISDICTION OF SUPERIOR COURT but what specially appears to be so; and nothing is intended to be within the jurisdiction of an inferior court but what is specially alleged. *Kennedy v. Greer*, 439.
 5. CIRCUIT COURTS OF ILLINOIS ARE SUPERIOR COURTS OF GENERAL JURISDICTION. *Id.*
 6. CIRCUIT COURTS OF UNITED STATES ARE ENDOWED WITH SUCH ORIGINAL AND GENERAL JURISDICTION as to entitle them to the benefit of all legal intendment necessary to support and uphold their acts until reversed or annulled by a superior tribunal. *Byers v. Fowler*, 271.
 7. JURISDICTION OF APPELLATE COURT ON APPEAL FROM JUSTICE'S COURT is no greater than that of the justice's court. *People v. Skinner*, 432.
 8. APPELLATE COURT MUST DISMISS SUIT APPEALED FROM JUSTICE'S COURT whenever it appears that the justice had no jurisdiction. *Id.*
 9. JUDGMENT FOR SUM WITHIN JURISDICTION OF JUSTICE OF PEACE shows *prima facie* his jurisdiction in that respect. *Id.*
 10. VERDICT FOR SUM BEYOND JURISDICTION OF JUSTICE OF PEACE, rendered on appeal from justice's court, shows *prima facie* that the case was not within the jurisdiction of the justice. *Id.*
 11. PLAINTIFF CAN NOT, BY REMITTING PORTION OF VERDICT RENDERED ON APPEAL from justice's court, confer jurisdiction thereupon. *Id.*
 12. APPELLATE JUDGE MAY DECLINE TO REGARD VERDICT IN EXCESS OF JURISDICTION of justice of peace, as a conclusive test of jurisdiction, and need not dismiss the case, but he has no authority to determine the amount of indebtedness, except on the question of jurisdiction. *Id.*
 13. VERDICT ON APPEAL FROM JUSTICE'S COURT BEING IN EXCESS OF JURISDICTION thereof, plaintiff should move for a new trial. *Id.*
- See ATTACHMENTS, 5, 7; CRIMINAL LAW, 2; EQUITY, 2; JUDGMENTS, 6-14, 21, 22, 43; PARTITION, 2; PARTNERSHIP, 8; PROBATE COURTS.

JURISPRUDENCE.

See DEFINITIONS.

JURY AND JURORS.

1. THAT JURIES HAVE RIGHT AS WELL AS POWER TO RESOLVE BOTH THE LAW and the facts by their general verdict in criminal cases, was a favorite doctrine of the early jurists and statesmen throughout the United States. *State v. Croteau*, 90.
2. ALL QUESTIONS OF LAW AS WELL AS OF FACT, INVOLVED IN ISSUE to the country, were in civil as well as criminal cases anciently resolved by the jury. *Id.*
3. ANCIENT MEANING OF MAXIM, *Ad questionem facti non respondent iudices, ad questionem legis non respondent juratores*, was, that the questions of fact appearing on the record should not be answered by the court, nor the questions of law by the jury. *Id.*
4. DOCTRINE THAT QUESTIONS OF LAW THAT MIGHT ARISE INCIDENTALLY in the determination of an issue of fact could be separated from the questions of fact, and be left to the decision of the court, otherwise than by demurrer to the evidence, or the finding of a special verdict, was unknown to the ancient common law, and has grown out of the modern practice of granting new trials for a difference of opinion between the court and the jury upon questions of law arising on the trial. *Id.*
5. PRIOR TO PRACTICE OF GRANTING NEW TRIALS, JURY ALONE WERE RESPONSIBLE for any error of law in their general verdict, and consequently had the right to determine it in conformity to their own judgment. *Id.*
6. JURY WERE ANCIENTLY SUBJECT TO ATTAINT FOR ERROR IN DECIDING the law involved in their general verdict, and were not protected from attaint by following the instructions of the judges in regard to the law, if the instructions turned out to be erroneous, nor were they liable to attaint for disregarding the directions of the judge, if they determined the matter of law correctly. *Id.*
7. BILLS OF EXCEPTIONS WOULD NOT LIE FOR MISDIRECTION OF JUDGES to the jury in point of law, while the process of attaint continued in use, for the jury were responsible for the correct decision of such points of law upon that process. *Id.*
8. IT WAS ANCIENTLY ADMITTED TO BE PROVINCE OF JURY, in civil cases, to decide in conformity to their own judgment all questions, whether of law or of fact, which were embraced in the issue committed to their charge. *Id.*
9. SINCE SUBSTITUTION OF MOTIONS FOR NEW TRIALS AND BILLS OF EXCEPTIONS for the process of attaint, it has become the legal duty of the jury, in civil cases, to comply with the instructions of the court in regard to questions of law. *Id.*
10. ANCIENT COMMON-LAW RIGHT OF JURY, IN CRIMINAL CASES, to determine both the law and the fact, remains unimpaired. *Id.*
11. WHEN POLITICAL POWER IS CONFERRED ON TRIBUNAL without restriction or control, such tribunal has the right to exercise it; the power of a jury in criminal cases to determine the whole matter in issue, submitted to their charge, is such a power which they may therefore lawfully and rightfully exercise. *Id.*

12. PROCESS OF ATTAINT FOR FALSE VERDICT WAS NEVER EXTENDED to prosecutions for crimes. *Id.*
 13. GRAND JURY IS APPENDAGE OF COURT, AND WITNESSES BEFORE IT ARE AMENABLE to the court precisely as are witnesses before the trial jury. *Heard v. Pierce*, 757.
 14. GRAND JURY MAY DIRECT OFFICER TO DETAIN CONTUMACIOUS WITNESS who refuses to be sworn and behaves disrespectfully before them, and to take him before the court, and such witness is liable for an assault upon the officer to escape detention. *Id.*
- See ADVERSE POSSESSION, 3; ATTACHMENTS, 2; CRIMINAL LAW, 2, 27, 35; JURISDICTION, 10-13; NEGOTIABLE INSTRUMENTS, 9, 18; PLEADING AND PRACTICE, 5; TRESPASS, 10; WILLS, 2, 4.

JUSTICES' JUDGMENTS.

See JUDGMENTS, 5.

JUSTICES OF THE PEACE.

See CRIMINAL LAW, 9, 10; EXECUTIONS, 1, 24; JUDGMENTS, 5; JURISDICTION, 7-13.

JUSTIFICATION.

See CRIMINAL LAW, 13-15, 29; TRESPASS, 7.

LANDLORD AND TENANT.

1. WHERE OWNER OF FARM AND FERRY LEASES THEM BY PAROL for a year, the lessee agreeing to pay as rent one half of the profits and proceeds of the farm, and one half of the receipts of the ferry, such lessee is the tenant, not the servant, of the owner, and the latter is not liable to an action for injuries caused to a third person by such tenant's negligence in the management of the ferry. *Felton v. Deall*, 61.
2. CLAUSE IN LEASE OF FARM AND FERRY MAKING LESSEE LIABLE to the lessor "for all damage occasioned by willful misconduct or neglect in the management of the farm and premises, and in the management of the ferry and boat," applies only to such damages as might result to the lessor's reversionary interest from the misconduct or neglect of the lessee, but does not render the lessor liable for injuries done by the lessee to third persons. *Id.*

See AGENCY, 4; EVIDENCE, 25.

LARCENY.

See CRIMINAL LAW, 30; SALES, 8, 9.

LEASES.

See AGENCY, 4; LANDLORD AND TENANT.

LEGISLATURE.

See CONSTITUTIONAL LAW; EVIDENCE, 6.

LEVY.

See EXECUTIONS, 2, 4-6, 25, 26; SURETYSHIP, 3, 4.

LEX LOCI CONTRACTUS.

See CONFLICT OF LAWS; MARRIAGE AND DIVORCE, 1.

LICENSES.

1. LICENSE IS BARE AUTHORITY TO DO CERTAIN ACT or series of acts upon another's land, without possessing any estate therein, and is not assignable, and is gone if the owner of the land transfers his title to another, or if either party die. *Hazleton v. Putnam*, 158.
2. PAROL LICENSE WHILE EXECUTORY MAY BE REVOKED AT PLEASURE, but when executed, it can not be so revoked as to make the licensee a trespasser, and the acts done under it tortious. *Id.*
3. PAROL LICENSE GIVES NO INDEFEASIBLE POWER OR AUTHORITY to exercise a continuing privilege on another's land, even when carried into execution, and upheld by acts done *in pais* in accordance with its terms. *Id.*
4. LICENSEE MAKING IMPROVEMENTS OR EXPENDITURES ON FAITH OF PAROL LICENSE may have equitable interposition, at all events so far as to restrain their appropriation by the licensor, without first placing the licensee in the same position in which he stood before the execution of the license. *Id.*
5. PART PERFORMANCE OF AGREEMENT FOR EASEMENT, AND EXECUTION OF PAROL LICENSE, take such agreement and license out of the statute of frauds. *Id.*
6. PAROL LICENSE TO WORK MINERAL LAND ON SHARES IS IRREVOCABLE, where the licensee has been induced to make expensive improvements under the license, without giving him six months' notice to quit, or refunding the amount expended. *Bush v. Sullivan*, 506.
7. PAROL LICENSE TO WORK MINERAL LAND NOT IPSO FACTO VOID under statute of frauds, where improvements have been made on its faith, but it may be declared void by a competent tribunal on terms calculated to prevent fraud. *Id.*

See CRIMINAL LAW, 21.

LIENS.

1. STATUTE GIVING LIEN TO LABORERS FOR SERVICES performed by them in converting standing trees into logs, masts, spars, and other lumber does not conflict with the constitution, nor abridge the right of the citizen to acquire, possess, and protect property. *Spofford v. True*, 621.
2. WHERE OWNER NEGLIGENTLY INTERMINGLES LOGS CUT BY DIFFERENT COMPANIES of workmen, so that the lots upon which the several laborers worked can not be distinguished, the respective liens of the workmen will be upon the whole mass. *Id.*
3. LIEN OF LABORERS ON LUMBER GOT OUT BY THEM IS RESTRICTED to the personal services of the claimant, and does not extend to expenses incurred in getting into the woods. *Id.*
4. TITLE TO LAND ACQUIRED ACCORDING TO PROVISIONS OF STATUTE GIVING LIENS to laborers for services performed by them in the erection of buildings thereon is valid, although all the facts necessary to make out such title are not shown by the records. Parol testimony may be introduced to show when the payment for such services became due. *Parsons v. Copeland*, 628.

See JUDGMENTS, 25, 26; MORTGAGES, 3; PARTNERSHIP, 10, 11; VENDOR AND VENDER, 3-5.

LIMITATIONS.

See STATUTE OF LIMITATIONS.

LOST INSTRUMENTS.

See DEEDS, 7, 10; EQUITY, 4; EVIDENCE, 10, 24.

LOTTERIES.

See CRIMINAL LAW, 23.

LUNACY.

See INSANITY.

MAINTENANCE.

See PARENT AND CHILD, 2.

MALICE.

See ELECTIONS, 1.

MANDAMUS.

MANDAMUS CAN BE ISSUED BY SUPREME JUDICIAL COURT OF MAINE only to courts of inferior jurisdiction, to corporations, and to individuals. *Dunnett, Petitioner*, 602.

See OFFICES AND OFFICERS, 3.

MANSLAUGHTER.

See CRIMINAL LAW, 31, 43.

MARKET OVERT.

See SALES, 1.

MARRIAGE AND DIVORCE.

1. ON MARRIAGE, LEX LOCI CONTRACTUS GOVERNS RIGHTS which each party takes in the property of the other, and which either owned at the time of the marriage; and if by the laws of that state the husband acquires no title in the property of the wife on marriage, their subsequent removal to this state works no change in the title, and gives him no such right in the property that it is subject to execution for his debts. *Doe v. Campbell*, 198.
2. HUSBAND IS NOT LIABLE TO WIFE'S COUNSEL IN DIVORCE SUIT brought against her, in which she prevails, for his fee. *Coffin v. Dunham*, 769.
See HUSBAND AND WIFE, 2, 4.

MARRIED WOMEN.

1. BOTH HUSBAND AND WIFE MUST JOIN IN ACTION OF TORT brought to recover damages for personal injuries sustained by the wife, and his previous desertion of her does not remove the necessity of his joining as co-plaintiff. *Ballard v. Russell*, 620.
2. STATUTES GIVING ADDITIONAL RIGHTS AND REMEDIES TO MARRIED WOMEN relate to property, but do not apply to actions for torts. *Id.*
See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. MASTER IS NOT LIABLE TO HIS SERVANT FOR DAMAGES resulting from the negligence of another servant, unless the latter is shown to have been habitually careless or unskillful. *Hubgh v. N. O. & O. R. R. Co.*, 565.
2. SERVANT UNDERTAKES, AS BETWEEN HIMSELF AND HIS MASTER, to run all the ordinary risks of the service. *Id.*
3. SERVANT WHO IS GUILTY OF CONTRIBUTORY NEGLIGENCE is not entitled to damages. *Id.*

MAXIMS.

See JURY AND JURORS, 3; TRESPASS, 4.

MERGER.

See EASEMENTS, 4-6; JUDGMENTS, 24.

MILLS.

See INSURANCE—FIRE, 6; PUBLIC LANDS, 3; WATERCOURSES, 7, 8.

MINING LANDS.

See LICENSES, 6, 7.

MISDEMEANORS.

See CRIMINAL LAW, 29, 31, 32, 47.

MISTAKE.

See DEEDS, 2; ESTOPPEL, 4; PUBLIC LANDS, 5; TROVER, 3.

MONEY HAD AND RECEIVED.

See USURY, 5.

"MORE OR LESS."

See DEEDS, 3.

MORTGAGES.

1. DEED ABSOLUTE ON FACE MAY BE SHOWN TO HAVE NO GREATER EFFECT THAN MORTGAGE, by records and parol proof; and this may be done as between third persons with notice, as well as between the parties. *Hall v. Savill*, 485.
2. DEED GIVEN AS SECURITY IS MORTGAGE, although an absolute conveyance in form. *Id.*
3. MORTGAGOR OF LAND IS CONSIDERED THE OWNER, subject only to the lien of the mortgage. *Id.*
4. MORTGAGEE INSURING PREMISES GENERALLY FOR HIS OWN BENEFIT may recover, in case of a loss before payment of the mortgage, the entire sum insured without assigning his mortgage interest or any part of it to the insurers. *King v. State Mut. Fire Ins. Co.*, 683.
5. MORTGAGEE HAS INSURABLE INTEREST AND MAY INSURE GENERALLY on the property without disclosing his interest unless inquired of respecting it. *Id.*
6. MORTGAGEE IS NOT TRUSTEE FOR MORTGAGOR BEFORE ENTRY for condition broken. *Per Shaw, C. J.* *Id.*

See EASEMENTS, 5, 6; EXECUTIONS, 10.

MOTIONS.

See PLEADING AND PRACTICE, 2.

MUNICIPAL CORPORATIONS.

See CORPORATIONS, 9, 10; HIGHWAYS, 7; TAXATION.

MURDER.

See CRIMINAL LAW.

NAMES.

See TRADE NAMES.

NECESSARIES.

See HUSBAND AND WIFE, 1, 2.

NECESSARY PARTIES.

See PARENT AND CHILD, 2; PARTITION, 1.

NEGLIGENCE.

1. PLAINTIFF, TO SUSTAIN ACTION FOR INJURY CAUSED BY NEGLIGENCE OF DEFENDANT, must show that the injury did not occur to him, in whole or in part, from any want of ordinary care on his own part. All that the law requires of him is care and prudence equal to his capacity. *Robinson v. Cone*, 67.
 2. THOUGH CHILD OF TENDER YEARS MAY BE IN HIGHWAY FROM FAULT or negligence of his parents, and so be improperly there, yet if he is hurt by the negligence of the defendant he is not precluded from his redress. *Id.*
 3. ONE KNOWING THAT CHILD OF TENDER YEARS IS IN HIGHWAY is bound to a proportionate degree of watchfulness, and what would be but ordinary neglect in regard to one whom he supposed to be a person of full age and capacity would be gross neglect as to a child, or one known to be incapable of escaping danger. In the case of a child four years old, he is bound to the utmost circumspection. *Id.*
 4. CIVIL ACTION CAN NOT BE MAINTAINED UNDER COMMON LAW, by the relative, for the death of a free person. *Hubgh v. N. O. & C. R. R. Co.*, 565.
- See COMMON CARRIERS; CORPORATIONS, 9, 10; EQUITY, 3; EXECUTIONS, 16, 21, 22; INSURANCE—MARINE; JUDGMENTS, 27, 28; LANDLORD AND TENANT; LIENS, 2; MASTER AND SERVANT; NEGOTIABLE INSTRUMENTS, 10; NEW TRIAL, 1; PHYSICIANS; SHIPPING, 2, 3; STATUTES, 3; TAXATION, 5, 7; TROVER, 5.

NEGOTIABLE INSTRUMENTS.

1. ORDER DRAWN FOR "37.89" WITHOUT ANY "\$" IS NOT VOID, as being unintelligible; but the court will intend that the figures are used as whole numbers and decimals to express the national currency of the United States. *Northrop v. Sanborn*, 83.
2. WHERE CREDITOR DRAWS ORDER ON HIS DEBTOR, upon which the latter indorses an agreement to pay what may be due after a settlement, the

debtor is, after an attempt at settlement has failed, justified in paying the whole amount of the order, and may recover judgment against the creditor for the balance which he paid over and above the amount found to be due, in an action brought by the creditor against him. *Id.*

3. NOTHING SHORT OF DEMAND OF PAYMENT, REFUSAL, AND NOTICE will fix the indorser; mere notice of non-payment is not sufficient. *Jones v. Robinson*, 212.
4. NOTE INDORSED AFTER MATURITY, IN ITS LEGAL EFFECT, AS BETWEEN INDORSER AND INDORSEE, BECOMES an inland bill of exchange, payable on demand, and between indorsee and maker, it remains a note payable on demand. *Id.*
5. INDORSEE'S UNDERTAKING IS PREDICATED UPON CONDITIONS, and unless they are performed they can not be made absolute, so as to entitle the holder to an action against him. It makes no difference whether the indorsement be made before maturity or afterwards. *Id.*
6. NOTE PAYABLE AT DAY CERTAIN, INDORSED BEFORE MATURITY, must be presented on that day to fix the indorser, while the same note, indorsed after maturity, becoming in legal effect payable on demand, need not be presented on any given day. *Id.*
7. SAME RULES, AS TO DEMAND AND PROMPT NOTICE, PREVAIL, whether bill be indorsed before or after maturity, or where non-negotiable bill is assigned. *Id.*
8. WHAT AMOUNTS TO DUE DILIGENCE IN PRESENTATION OF NOTE, PAYABLE ON DEMAND, depends upon the circumstances of the case. *Id.*
9. TIME WHEN PRESENTATION FOR PAYMENT OF NOTE PAYABLE ON DEMAND should be made, is a question of law for the court, based upon the facts proven. *Id.*
10. NEGLECT TO PRESENT FOR PAYMENT FOR TWO YEARS after indorsement, without excuse, will release the indorser. *Id.*
11. SUIT BY INDORSEE AGAINST INDORSER, BROUGHT THREE YEARS AND FIVE MONTHS after the indorsement, and conveying to the defendant the only notice of demand upon the makers which he has received, is not a notice within reasonable time. *Mudd v. Harper*, 644.
12. SUIT BROUGHT BY INDORSEE AGAINST MAKERS OF NOTE is not adequate evidence of a sufficient demand, and of notice within proper time to the indorser. *Id.*
13. IT IS NOT INDORSEE'S DUTY TO MAKE DEMAND AND GIVE NOTICE on the day he receives a note payable on demand, but he has a reasonable time for that purpose. *Id.*
14. RIGHT OF ACTION OF INDORSEE OF NEGOTIABLE INSTRUMENT is perfect against all the parties on the maturity thereof, when demand has been made and notice of non-payment given, as required by the law merchant. *Id.*
15. INDORSEMENT OF BILL AFTER MATURITY IS EQUIVALENT to drawing a bill at sight. *Id.*
16. PROMISSORY NOTE IS NEGOTIABLE AS WELL AFTER AS BEFORE IT BECOMES DUE. *Id.*
17. NOTE OR BILL PAYABLE ON DEMAND MUST BE PRESENTED, or at least put in circulation for that purpose, within a reasonable time after it has been received. *Id.*

18. WHAT IS REASONABLE TIME IS QUESTION OF LAW except in very particular cases, when it is a mixed question of law and fact. *Id.*
 19. TO BIND INDORSER OF PROMISSORY NOTE the holder is bound to make a presentment to the maker, either in person or at his place of residence. It is not sufficient to present it at an office which the maker often visits. *Bigelow v. Kellar*, 555.
 20. NOTICE OF PROTEST SERVED UPON ONE OF SEVERAL EXECUTORS of a deceased indorser is sufficient to bind the estate. *Lewis v. Babcock*, 561.
- See ASSIGNMENT OF CONTRACTS; ATTACHMENTS, 4; ATTORNEY AND CLIENT, 5; BANKRUPTCY AND INSOLVENCY, 2, 4; EVIDENCE, 17; GUARANTY; JUDGMENTS, 38; PARTNERSHIP, 14, 15; PAYMENT, 2, 3; PUBLIC LANDS, 10; SALES, 6; STATUTE OF LIMITATIONS, 1, 2, 9; TROVER, 2, 3; USURY, 3, 4.

NEW PROMISE.

See STATUTE OF LIMITATIONS, 9.

NEW TRIAL.

1. DILIGENCE IN SERVING SUBPOENA—NEW TRIAL.—Party who does not make an effort to subpoena his witnesses until the day of the trial, and then leaves his subpoenas upon the desk of the clerk, who neglects to serve them, does not use due diligence, and a new trial will not be granted because of the absence of said witnesses. *Rogers v. Huie*, 300.
 2. IN ALL CASES WHERE NEW TRIAL IS MOVED FOR UPON GROUND OF SURPRISE OR NEWLY DISCOVERED EVIDENCE, the party must in his affidavit set forth such evidence clearly and explicitly, and if possible procure the affidavits of the parties whose testimony would constitute such new evidence. *Id.*
 3. IN AFFIDAVIT ON MOTION FOR NEW TRIAL, a party who states that he has a good defense must state wherein said defense consists. *Id.*
 4. IMPROPER EVIDENCE ADMITTED AGAINST OBJECTION of the defendant is ground for new trial. *Innis v. Steamer Senator*, 305.
- See CRIMINAL LAW, 7, 8; JURISDICTION, 13; JURY AND JURORS, 4, 5, 9; PLEADING AND PRACTICE, 17.

NIL DEBET.

See JUDGMENTS, 43, 44.

NON-NEGOTIABLE BILLS.

See NEGOTIABLE INSTRUMENTS, 7.

NON-RESIDENTS.

See BANKRUPTCY AND INSOLVENCY, 3, 4.

NOTICE.

1. NOTICE PRIOR TO PAYMENT OF PURCHASE MONEY WILL BIND PARTY as effectually as if received before purchase. *Price v. McDonald*, 657.
2. INFORMATION GIVEN TO PURCHASER WHICH OUGHT TO PUT HIM ON INQUIRY is sufficient notice in equity. *Id.*
3. PARTY WILL BE CHARGED WITH NOTICE OF CONTENTS AND EFFECT OF INSTRUMENT which actually affects the land conveyed to him, and which

without doubt includes that land, if, after becoming aware of its existence, he fails to make suitable inquiry, notwithstanding that the party whose interest would prompt him to misrepresent should inform him that the incumbrance was paid off or discharged without, however, furnishing any proof of that fact. *Id.*

See ATTACHMENTS, 8; BONA FIDE PURCHASERS; DEEDS, 9; EXECUTIONS, 8, 9, 18; JUDGMENTS, 13-16, 19, 20; MORTGAGES, 1; NEGOTIABLE INSTRUMENTS; SALES, 7; STATUTE OF LIMITATIONS, 1; TROVER, 5.

NOTICE TO QUIT.

See LICENSEES, 6.

NUISANCE.

1. NUISANCE IS ANYTHING THAT WORKETH HURT, INCONVENIENCE, OR DAMAGE TO ANOTHER. *Ooker v. Birge*, 347.
2. IF ONE DO AN ACT OF ITSELF LAWFUL, which, being done in a particular place, necessarily tends to the damage of another's property, it is a nuisance. *Id.*
3. TO CONSTITUTE NUISANCE, it is not necessary that a noxious trade or business should be carried on that will endanger the health of a neighborhood. *Id.*
4. ERECTION OF STABLE IN SUCH CLOSE PROXIMITY TO HOTEL as to work injury, inconvenience, prejudice, and damage to the proprietor of the hotel property will be deemed a nuisance. *Id.*
5. INJUNCTION WILL LIE TO ABATE PRIVATE NUISANCE. *Id.*
6. LIVERY STABLE IS NOT NUISANCE *per se*, and a court of equity can not restrain the building of one nor its appropriation to the use intended. *Kirkman v. Handy*, 45.

See HIGHWAYS, 2, 5, 6, 8.

NUNC PRO TUNC.

See JUDGMENTS, 4.

OFFICES AND OFFICERS.

1. JUDGES OF SUPERIOR COURTS ARE NEVER TO BE MADE LIABLE, either by civil proceedings or by indictment, for anything done by them in a judicial capacity; but judges of inferior courts are liable when acting beyond their jurisdiction. *Borden v. State*, 217.
2. PERFORMANCE OF DUTY INTRUSTED TO EXECUTIVE DEPARTMENT OF GOVERNMENT TO NOMINE is an official act of that department, and not the individual act of the persons holding office, notwithstanding other persons might lawfully have performed the same acts, if performance had been by law intrusted to them. *Dennett, Petitioner*, 602.
3. DUTY DEVOLVED UPON EXECUTIVE DEPARTMENT IS PERFORMED BY INCUMBENTS, upon the responsibility of their official stations and under the sanctity of their official oaths, and the judicial department can not interfere with these official acts by *mandamus*. *Id.*

See ATTACHMENTS, 1, 2; ELECTIONS, 2; REPLEVIN; TAXATION, 4-7; TRESPASS, 4-7.

OPINIONS OF WITNESSES.

See CRIMINAL LAW, 41, 42; WITNESSES, 2.

ORDINANCES.

See TAXATION, 3; WATERCOURSE, 6, 7.

OUTLAWRY.

See JUDGMENTS, 17.

OVERFLOWING LANDS.

See EASEMENTS, 7, 8; PUBLIC LANDS, 2.

OYER.

See EVIDENCE, 11; PLEADING AND PRACTICE, 14.

PARENT AND CHILD.

1. FATHER MAY RESORT TO EQUITY TO HAVE ALLOWANCE FOR INFANT DAUGHTER'S SUPPORT and education decreed to be paid out of the income of the estate of the daughter by the trustee of the estate, where, by reason of his poverty and bodily infirmity, he has become unable to support her *Watts v. Steele*, 207.
2. INFANT IS NOT NECESSARY PARTY WHERE FATHER RESORTS TO EQUITY FOR ALLOWANCE to be decreed to him for her support and education by the trustee of her separate estate. *Id.*
3. PARENT IS LIABLE FOR ACTS OF HIS CHILD where they are performed under his directions. *Carmouche v. Bonis*, 558.

See INFANCY, 5, 6; NEGLIGENCE, 2.

PAROL EVIDENCE.

See ATTACHMENTS, 8; DEEDS, 1, 2; EVIDENCE, 10, 13-18, 24; LIENS, 4; MORTGAGES, 1; RECORDS.

PARTIES.

See JUDGMENTS, 6, 7; MARRIED WOMEN, 1; PARENT AND CHILD, 2; PARTITION; 1; MORTGAGES, 1.

PARTITION.

1. IN PARTITION SUIT, ALL PERSONS INTERESTED ARE NECESSARY PARTIES. *Batterton v. Chiles*, 539.
2. JURISDICTION OF EQUITY IN PARTITION IS UNDOUBTED, and in many cases is indispensable. *Howey v. Goings*, 427.
3. BILL IN CHANCERY LIES FOR PARTITION, NOTWITHSTANDING ADVERSE POSSESSION, unless it has been continued sufficiently long to bar a recovery under the statute of limitations. *Id.*
4. EQUITY WILL AT ONCE DECREE PARTITION BETWEEN PARTIES WHEN TITLE IS CLEAR, though when the title is doubtful, it sometimes requires complainant to establish his right at law before proceeding in the partition suit. *Id.*
5. OMISSION TO DISPOSE OF CROSS-BILL CLAIMING COMPENSATION FOR IMPROVEMENTS, at the same time the decree for partition is made, is not error. *Id.*

6. IN PARTITION, CO-TENANTS HAVING MADE IMPROVEMENTS are entitled to have the portions of the premises including the improvements set off to them if practicable, and if the premises must be sold, are entitled to the actual increase of price received at the sale in consequence of the improvements. *Id.*

PARTNERSHIP.

1. PARTNERSHIP PROPERTY IS AS MUCH LIABLE TO JUDGMENTS FOR INDIVIDUAL as for partnership debts of the only ostensible partner. *How v. Kane*, 152.
2. PARTNERSHIP PROPERTY RECEIVED BY DORMANT FROM OSTENSIBLE PARTNER is subject to judgments against the latter alone, and the dormant partner is bound to disclose and account for it, and may be restrained from disposing of it in the mean time. *Id.*
3. DORMANT PARTNER IS NOT PERSONALLY LIABLE for the payment of judgments against the ostensible partner alone. *Id.*
4. CREDITORS OF FIRM HAD NO REMEDY AGAINST REPRESENTATIVES OF DECEASED PARTNER, at the common law, on the dissolution of the firm by the death of one of its members, but were compelled to look to the survivors alone for the payment of their debts. *Emanuel v. Bird*, 200.
5. IN EQUITY, PARTNERSHIP DEBTS ARE CONSIDERED JOINT AND SEVERAL, and the joint creditors have the right to proceed against the estate of the deceased partner if the survivors are insolvent. *Id.*
6. PARTNERSHIP AND SEPARATE CREDITORS OF DECEASED PARTNER TAKE PARI PASSU where the surviving partners are insolvent, and there is no joint fund to which the partnership creditors can resort. *Id.*
7. PARTNERSHIP DEBTS ARE JOINT AND SEVERAL in equity. *Camp v. Grant*, 321.
8. PARTNERSHIP DEBTS MAY BE PRESENTED AGAINST ESTATE OF DECEASED PARTNER, under the Connecticut statute, and allowed equally with separate debts whether the surviving partner is solvent and within the jurisdiction of the court or not. *Id.*
9. SEPARATE CREDITORS OF PARTNER HAVE NO PRIORITY RESPECTING HIS SEPARATE ESTATE in right of payment over creditors of the partnership, it seems. *Id.*
10. PARTNERSHIP CREDITORS HAVE NO SPECIFIC LIEN UPON FIRM ASSETS for the payment of their claims, either legal or equitable. *Allen v. Center Valley Co.*, 333.
11. PARTNERS HAVE LIEN ON JOINT FUNDS FOR PAYMENT OF JOINT DEBTS of the firm, by means of which the right of the joint creditors to priority of payment out of partnership assets are worked out. *Id.*
12. GOING FIRM MAY MAKE BONA FIDE DISTRIBUTION of the partnership funds among its members, or change them from joint to separate estate. *Id.*
13. BONA FIDE TRANSFER BY GOING PARTNERSHIP OF FIRM PROPERTY to a corporation taking in payment stock of the corporation to be held by the partners individually, not made in contemplation of insolvency or to defeat creditors, can not be impeached by partnership creditors on a bill filed against the corporation and attaching creditors of the individual partners, nor have the joint creditors any priority over separate creditors with respect to the stock received by the partners in payment.

although the assets at the time of the transfer were barely equal to the joint debts. *Id.*

14. NOTE EXECUTED IN FIRM NAME BY ONE MEMBER THEREOF is *prima facie* obligatory upon the firm, and it is incumbent upon a party denying the firm's liability to prove that it was not executed for the benefit of the firm or in its business. *Hamilton v. Summers*, 509.
15. FACT THAT PAYEE OF NOTE GIVEN BY ONE PARTNER IN FIRM NAME believed that the borrowed money for which it was given was to be applied to an individual purpose will not prevent the note from binding the firm, if the money borrowed was actually used for a partnership purpose. *Id.*
16. WHERE ONE PARTNER PURCHASES GOODS ON HIS SINGLE CREDIT for the use of the partnership, if the seller does not know at the time of the existence of the partnership, he may, when he discovers it, hold the firm liable. *Griffith v. Buffum*, 64.
17. WHERE TWO PERSONS HAVE COMMON INTEREST IN PROFIT AND LOSS of the business carried on by them, they are partners as between themselves. *Id.*
18. ADMISSIONS OF SURVIVING PARTNER, DIRECT OR INDIRECT, ARE EVIDENCE against him in a suit against him, although the judgment would not affect the question of contribution between him and the representatives of the deceased partner. *Hamilton v. Summers*, 509.
19. ADMISSIONS OF ONE PARTNER, MADE AFTER DISSOLUTION of the partnership, are not evidence against the other partner. *Id.*

PART PERFORMANCE.

See CONTRACTS, 9, 10; LICENSES, 5; SPECIFIC PERFORMANCE, 4.

PATENTS.

See PUBLIC LANDS, 4, 6, 8, 9.

PAYMENT.

1. VOLUNTARY PAYMENT ON UNJUST DEMAND, attempted to be enforced by legal proceedings, can not be recovered back, though made under protest, unless there is fraud on the part of the payee, and he knows the claim to be unjust. *Benson v. Monroe*, 716.
2. REMEDY ON DEBT FOR WHICH NOTE IS TAKEN IN PAYMENT is suspended until maturity of the note. *Mudd v. Harper*, 644.
3. HOLDER OF NOTE TAKEN IN PAYMENT OF PRECEDENT DEBT, at the maturity of the note, may, at his election, proceed either on the note or on the original cause of action. *Id.*

See ATTACHMENTS, 6; INTEREST; PLEADING AND PRACTICE, 14; TAXATION, 1; USURY.

PERFORMANCE.

See CONTRACTS, 5, 9, 10; RAILROADS, 2; SPECIFIC PERFORMANCE, 5.

PERILS OF THE SEA.

See INSURANCE—MARINE.

PHYSICIANS.

1. **PHYSICIAN ATTENDING PATIENTS AFFLICTED WITH INFECTIOUS DISEASES** is bound to take all such precautions as experience has found to be necessary, to prevent the communication of those diseases to his other patients. *Piper v. Meniffee*, 547.
2. **IN ACTION BY PHYSICIAN FOR SERVICES RENDERED TO PATIENT**, evidence that while rendering such services he attended patients afflicted with small-pox, and communicated that disease to the defendant, notwithstanding his promise made to the defendant when first employed by him that he would not while attending him wait upon small-pox patients, is admissible for the purpose of reducing the recovery for the services in the performance of which the violation of this promise and the consequent damage occurred. *Id.*

See CRIMINAL LAW, 41, 42.

PLEADING AND PRACTICE.

1. **STATUTE PROHIBITING SUING DEFENDANT OUT OF COUNTY WHERE HE RESIDES** or may be found gives the defendant a privilege which he may waive, and he must be regarded as having done so unless he makes his objection to the writ in apt time. *Kenney v. Greer*, 439.
2. **COURT MUST PRESUME THAT DEFENDANT HAS WAIVED STATUTORY RIGHT** of being sued in his own county, or else that facts existed which authorized a suit against him in the foreign county, unless he insists upon the privilege which the statute gives him, either by plea in abatement or by motion at the proper time. *Id.*
3. **TITLE TO LAND MUST BE TRIED** in the county where the land lies. *Beverly v. Burke*, 351.
4. **RULE OF PRACTICE REQUIRING TESTIMONY TAKEN BY COMMISSIONER** to be communicated to the adverse party before the cause is called for trial is merely directory. *Id.*
5. **COURT IN CHARGING JURY HAS NO RIGHT** to express or intimate his opinion as to what has or has not been proved during the trial. *Id.*
6. **DEMURRER OPENS WHOLE RECORD, AND WILL BE CARRIED BACK** and sustained to the first substantial defect in the pleadings. *McDonald v. Wilkie*, 423.
7. **PLEAS INAPPLICABLE OR INSUFFICIENT** may be stricken out, or demurrers to them sustained, without error. *Swafford v. Whipple*, 498.
8. **OBJECTION TO REJECTION OF PLEAS IS WAIVED** by going to trial on those remaining, and taking no exceptions to the ruling of the court below. *Id.*
9. **DEFECT IN ANSWER AS TO MATTERS OF SUBSTANCE IS NOT CURED** by filing a general replication to the answer. *Byers v. Fowler*, 271.
10. **PENDENCY OF SUIT IN ONE STATE CAN NOT BE PLEADED IN BAR** or abatement of a second action in another state between the same parties and for the same cause of action. *McJilton v. Love*, 449.
11. **PENDENCY OF WRIT OF ERROR CAN NOT BE PLEADED IN ABATEMENT** of another action in the same state, unless the writ of error operates as a *supersedeas*, and not even then if the writ of error was sued out after the commencement of the second action. *Id.*
12. **STATEMENTS IN ANSWER RESPONSIVE TO BILL ARE TO BE TAKEN AS TRUE**. *Price v. McDonald*, 657.

13. **FACTS AVERRED IN ANSWER AND SWORN TO ARE CONCLUSIVE** upon all points responsive to the bill, where the bill is not supported by affidavit or proof. *Garretson v. Vanloon*, 492.
14. **OYER NOT HAVING BEEN CALLED FOR**, and the defense of payment and the general issue having been interposed, plaintiff need not introduce in evidence the instrument upon which he founds his suit. *Jones v. Robinson*, 212.
15. **IDENTICAL INSTRUMENT SUED UPON, IF PROPERT HAD BEEN MADE OF IT**, had, formerly, to be introduced in evidence, but this rule has been modified by our modern practice. *Id.*
16. **PAPER FILED WITH BRIEF OF COUNSEL**, but not mentioned in the pleadings, can not be regarded as part of the record in the cause. *Batterton v. Chiles*, 539.
17. **APPEAL MAY BE TAKEN TO HIGHER COURT**, without moving for a new trial in the court below. *Innis v. Steamer Senator*, 305.
18. **PARTY COLLECTING MONEY ON JUDGMENT CAN NOT PROSECUTE WRIT OF ERROR** to reverse it until he has refunded the money. *Knox's Distributees v. Steele*, 181.
19. **PLAINTIFF IN ERROR CAN NOT ASSIGN ERRORS AGAINST HIS CO-PLAINTIFFS**, and thus reverse a judgment or decree rendered against the defendant in error; consequently a *scire facias* to his co-plaintiffs to hear errors can not be granted. *Id.*
20. **WRIT OF ERROR CAN NOT BE AMENDED BY STRIKING OUT NAME OF ONE AS PLAINTIFF** and making him a defendant in error, where the record does not show that he should have been made a defendant and that he was improperly made a plaintiff. *Id.*
21. **BILLS OF EXCEPTION ARE CONSTRUED MOST STRONGLY AGAINST PARTY EXCEPTING**. *Perminster v. Kelly*, 177.
22. **PROCEDENDO WILL NOT BE AWARDED, THOUGH PLAINTIFF BELOW REVERSE JUDGMENT**, if the plaintiff's right of recovery is barred by the statute of limitations. *Mudd v. Harper*, 644.
23. **SUPREME COURT WILL NOT REVIEW ITS OWN JUDGMENT** rendered several terms before, upon a writ of error *coram vobis*; this writ not lying in a supreme court. *Reid v. Strider*, 120.
24. **DEATH OF DEFENDANT IN ERROR**, after judgment in lower court and before a decision of the appellate court, does not abate the proceedings, and the case may be reviewed in the name of the executor when it goes back to the court below. *Id.*
25. **JUSTICE DOES NOT REQUIRE THAT COURT SHOULD OPEN CASE** for re-examination and decision, under the Maine statute, when the only exceptions sustained are those taken to the admission of evidence which, when excluded, leaves sufficient evidence, in the opinion of the court, to sustain the judgment. *McLellan v. Longfellow*, 599.
26. **SECONDARY EVIDENCE, IF NOT OBJECTED TO AT THE TIME, IS COMPETENT** to go to the jury, and it is too late to object for the first time in the appellate court. *Floyd v. State*, 250.
27. **OBJECTION THAT PLAINTIFF HAS NO CAUSE OF ACTION** may be urged on appeal. *Beall v. Hiliary*, 649.
28. **CASE SHOULD NOT BE SENT BACK TO JURY**, by supreme judicial court of Maine, on a point not raised at the trial, and to hear evidence to the in-

roduction of which no objection was offered at the trial, and when perhaps no such evidence exists. *Bassett v. Carleton*, 605.

See ADVERSE POSSESSION, 3; ATTACHMENTS, 5, 8, 9; BONA FIDE PURCHASERS, 4; CORPORATIONS, 3; CO-TENANCY, 1; CRIMINAL LAW, 5-8, 21, 27, 36-39; EJECTMENT; EQUITY; EVIDENCE, 1, 3, 11, 12, 19, 22; EXECUTIONS, 3, 7; HIGHWAYS, 2; INJUNCTIONS; INSANITY; INSURANCE—FIRE, 9; JUDGMENTS; JURISDICTION, 8, 11-13; JURY AND JURORS; MARRIED WOMEN, 1; NEGLIGENCE, 1; NEGOTIABLE INSTRUMENTS, 9, 18; NEW TRIAL; PARENT AND CHILD, 2; PARTITION; SPECIFIC PERFORMANCE, 5; STATUTE OF LIMITATIONS, 3, 6; TRADE NAMES, 1; TRESPASS, 1, 7, 8, 10; USURY, 6; WILLS, 1, 2; WITNESSES, 1.

PLEAS.

See PLEADING AND PRACTICE, 7, 8.

POSSESSION.

See ADVERSE POSSESSION; CO-TENANCY, 2; DEEDS, 10; EASEMENTS, 4-6; EJECTMENT, 6, 7; EVIDENCE, 25; EXECUTIONS, 25; PARTITION, 3; SPECIFIC PERFORMANCE, 2; STATUTE OF LIMITATIONS, 8; TROVER, 1, 2.

POWERS.

EVERY GENERAL POWER OR DUTY GIVEN OR ENJOINED IMPLIES EVERY PARTICULAR POWER necessary to its exercise or performance. *Heard v. Pierce*, 757.

See AGENCY, 3, 4; JUDGMENTS, 2, 3; STATUTE OF LIMITATIONS, 7.

PRACTICE.

See PLEADING AND PRACTICE.

PRE-EMPTION.

See PUBLIC LANDS, 10.

PRESCRIPTION.

See EASEMENTS, 1.

PRESENTMENT.

See NEGOTIABLE INSTRUMENTS.

PRESUMPTIONS.

See ATTACHMENTS, 8; BOUNDARIES; CORPORATIONS, 5; CRIMINAL LAW, 26; EVIDENCE, 24; PLEADING AND PRACTICE, 1, 2; PUBLIC LANDS, 7; STATUTES.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETYSHIP.

PRIVILEGED COMMUNICATIONS.

See ATTORNEY AND CLIENT, 1-4, 6.

PROBATE.

See WILLS, 2.

PROBATE COURTS.

PROBATE COURTS ARE SUPERIOR COURTS. *Borden v. State*, 217.

See JUDGMENTS, 13, 21; WILLS, 2.

PROCEDENDO.

See PLEADING AND PRACTICE, 22.

PROCESS.

1. TRUE TEST OF VOID PROCESS OCCASIONED BY IRREGULARITY is that the irregularity must be in the process itself, or in the mode of issuing it; it can not be irregular when sued out according to the established course of practice. *Byers v. Fowler*, 271.
2. COURTS HAVE POWER TO DETERMINE WHETHER a service of process was sufficient. *Borden v. State*, 217.

See ATTACHMENTS.

PROFERT.

See PLEADING AND PRACTICE, 15.

PROMISSORY NOTES.

See ASSIGNMENT OF CONTRACTS; ATTACHMENTS, 4; ATTORNEY AND CLIENT, 5; BANKRUPTCY AND INSOLVENCY, 2; BANKS AND BANKING; EVIDENCE, 17; EXECUTIONS, 2; GUARANTY; JUDGMENTS, 38; NEGOTIABLE INSTRUMENTS; PARTNERSHIP, 14, 15; PAYMENT, 2, 3; PUBLIC LANDS, 10; SALES, 6; STATUTE OF LIMITATIONS, 1, 2, 9; TROVER, 2, 3; USURY, 3, 4.

PROTEST.

See NEGOTIABLE INSTRUMENTS, 20.

PUBLICATION.

See ATTACHMENTS, 8.

PUBLIC LANDS.

1. ONLY JUDICIAL DEPARTMENT OF STATE IS CLOTHED WITH POWER TO INVESTIGATE ANTAGONISTIC CLAIMS of contending parties, and consequently an order of the executive correcting a grant, after the rights of third parties have intervened, is inoperative and void. *Sykes v. McBory*, 402.
2. GRANTS BY GOVERNMENT ARE CONSTRUED FAVORABLY FOR GRANTOR, and pass nothing by implication. *Wilcoxon v. McGhee*, 409.
3. GRANT OF LAND BY GOVERNMENT DOES NOT PASS RIGHT OF OVERFLOWING adjoining government lands by maintaining a dam on the land granted, though the dam was on the land at the time of the grant. *Id.*
4. GRANT OF PUBLIC LAND HAVING FIXED AND DEFINITE DESCRIPTION passes nothing but what is included within the boundaries expressed in the patent, or is naturally or necessarily annexed to the land. *Id.*
5. GRANT CAN NOT BE IMPEACHED IN COLLATERAL WAY AT LAW, by showing

that the grantee named in the grant was not the one intended; it should be first corrected by a *sci. fa.* or other proceeding in chancery. *Sykes v. McRory*, 402.

6. **HOLDER OF RECEIPT FROM STATE FOR PURCHASE PRICE OF LAND** is indefeasibly entitled to a patent, and said receipt is inchoate evidence of an absolute title. *Winter v. Jones*, 379.
7. **EVERY PRESUMPTION IS IN FAVOR OF VALIDITY OF GRANT.** *Id.*
8. **STATE PATENT PURPORTING TO CONVEY TITLE, WHICH IS VOID UPON ITS FACE**, as where the state had no authority to convey, may be collaterally attacked in an action of ejectment. *Id.*
9. **PATENT ISSUED BY VIRTUE OF UNCONSTITUTIONAL ACT IS VOID UPON ITS FACE.** *Id.*
10. **SALE OF IMPROVEMENTS UPON PUBLIC LANDS** to one who has a right to pre-emption will constitute a valuable and legal consideration for a promissory note. *Bryan v. Glass*, 576.

See CONSTITUTIONAL LAW, 13; SPECIFIC PERFORMANCE, 2.

QUANTUM MERUIT.

See CONTRACTS, 7-10.

QUESTIONS OF LAW AND FACT.

See ADVERSE POSSESSION, 3; JURY AND JURORS; NEGOTIABLE INSTRUMENTS, 9, 18; TRESPASS, 10; WILLS, 4.

RAILROADS.

1. **AGREEMENT MUST BE PERFORMED IN REASONABLE TIME, IF NO TIME IS MENTIONED**, where a railroad company agrees to fence its road through one's land. *Lawton v. Fitchburg R. R. Co.*, 753.
2. **PERFORMANCE AFTER ACTION COMMENCED OF AGREEMENT BY RAILROAD COMPANY TO FENCE** its road through the plaintiff's land in adjustment of damages for the right of way, if such performance was without the plaintiff's consent, does not affect his right to recover damages for not fencing in a reasonable time. *Id.*
3. **MEASURE OF DAMAGES AGAINST RAILROAD COMPANY FOR NOT FENCING** its road through the plaintiff's land in accordance with its agreement, in settling for the right of way, is such sum as it would fairly cost to make the fences as agreed, notwithstanding the erection of fences after the action was commenced, without the plaintiff's consent. *Id.*

RATIFICATION.

See AGENCY, 6; CORPORATIONS, 5.

RECEIPTS.

See PUBLIC LANDS, 6.

RECORDS.

RECORD CAN ONLY BE AMENDED BY SOME MATTER OF RECORD; parol evidence is not admissible for this purpose. *Metcalf v. Metcalf*, 190.

See DEEDS, 4, 5, 9; EVIDENCE, 4-7; EXECUTIONS, 11, 12, 20; JUDGMENTS, 34, 35; MORTGAGES, 1; PLEADING AND PRACTICE, 16.

RECOUPMENT.

See **CONTRACTS**, 9; **SALES**, 5, 6.

REDEMPTION.

See **EASEMENTS**, 6; **EXECUTIONS**, 12-17.

REGISTRATION.

See **EVIDENCE**, 8; **EXECUTIONS**, 11, 12, 20.

REMEDIES.

See **COVENANT**; **EVIDENCE**, 2; **HIGHWAYS**, 7; **PAYMENT**; **SALES**, 5; **STATUTES**, 3.

REPLEVIN.

REPLEVIN WILL NOT LIE for property held by an officer by virtue of an execution. *Spring v. Bowland*, 243.

REPLICATION.

See **PLEADING AND PRACTICE**, 9.

REPRESENTATIONS.

See **INSURANCE—FIRE**, 2-4, 7, 8.

RES GESTÆ.

See **EVIDENCE**, 20, 21, 25.

RETURN.

See **EXECUTIONS**, 1, 2, 6, 7, 22, 23, 26; **JUDGMENTS**, 23; **SURETSHIP**, 2, 4.

REVERSAL.

See **ATTACHMENTS**, 5; **EQUITY**, 2, 6; **EXECUTIONS**, 7; **INSANITY**, 5; **JUDGMENTS**, 2, 29-33; **JURISDICTION**, 6; **PLEADING AND PRACTICE**, 18, 19, 22.

REVOCATION.

See **LICENSES**, 2; **STATUTE OF LIMITATIONS**, 7.

RIPARIAN PROPRIETORS.

See **WATERCOURSES**, 1, 2.

ROADS.

See **CORPORATIONS**, 9; **HIGHWAYS**, 6.

SALES.

1. **NO SUCH THING AS MARKET OVERT IS KNOWN TO OUR LAW.** *Rogers v. Hsie*, 300.
2. **WARRANTY OF TITLE IS IMPLIED IN SALE OF CHATTEL** by one having possession and selling as his own, and a promise to refund the money paid is implied if the seller has no title. *Barton v. Flaherty*, 503.
3. **WARRANTY OF QUALITY WILL NOT IN GENERAL BE IMPLIED**, where none is expressly made, on a sale of goods or chattels, present and in view of the parties. *Getty v. Rountree*, 138.

4. WARRANTY THAT CHATTEL IS REASONABLY FIT FOR PURPOSE INTENDED IS IMPLIED when ordered from a manufacturer for a specific purpose. *Id.*
 5. VENDEE'S REMEDY FOR BREACH OF WARRANTY OF QUALITY is to retain the chattel and sue on the warranty, or if sued for the price, to recoup his damages. *Id.*
 6. VENDEE MAY RECOUP HIS DAMAGES FOR BREACH OF WARRANTY OF QUALITY in an action by the vendor on a promissory note given by the vendee for the price. *Id.*
 7. OFFER TO RETURN CHATTEL, OR GIVING NOTICE OF DEFECTS, by vendee, is unnecessary where there is a warranty and no fraud. *Id.*
 8. PRICE PAID FOR STOLEN CHATTEL MAY BE RECOVERED FROM THIEF, in *assumpsit*, although the thief has not been tried for the felony. *Barton v. Flaherty*, 503.
 9. ONE WHO RECEIVES AND SELLS STOLEN PROPERTY MAY BE HELD LIABLE FOR DAMAGES in a civil action, although it does not appear that the felon has been prosecuted for the theft. *Rogers v. Huie*, 300.
- See AGENCY, 5; AUCTIONS; BANKRUPTCY AND INSOLVENCY, 3; EXECUTORS AND ADMINISTRATORS; SPECIFIC PERFORMANCE, 3; STATUTE OF LIMITATIONS, 2; TROVER, 4, 5.

SANITY.

See INSANITY.

SATISFACTION.

See JUDGMENTS, 34, 35; SURETYSHIP, 1; TRESPASS, 1.

SCIRE FACIAS.

See PLEADING AND PRACTICE, 19; PUBLIC LANDS, 5.

SECONDARY EVIDENCE.

See EVIDENCE, 10-12; PLEADING AND PRACTICE, 20.

SEISIN.

See COVENANTS, 2, 3; DEEDS, 1.

SERVANTS.

See MASTER AND SERVANT.

SERVICE.

See PROCESS, 2.

SERVICES.

See LIENS; PHYSICIANS, 2.

SERVITUDES.

See EASEMENTS.

SET-OFF.

See BONA FIDE PURCHASERS, 1; CONTRACTS, 9; SALES, 5, 6; TRESPASS, 9.

SHERIFFS.

See ATTACHMENTS, 1, 2; EXECUTIONS; JUDGMENTS, 13; REPLEVIN; SURETYSHIP; TRESPASS, 4-7.

SHERIFF'S SALE.

See EXHIBITIONS, 8-20, 23; JUDGMENTS, 36; SURETYSHIP, 3, 4.

SHIPPING.

1. OFFICERS OF VESSELS MUST EXERCISE THE UTMOST VIGILANCE and secure the best means of avoiding accidents when crossing the usual track of steamers in a river in order to be entitled to damages resulting from collision. *Reese v. Steamer Mary Foley*, 557.
2. COLLISION OF VESSELS—NEGLIGENCE.—A vessel moored in line of usual travel in a harbor should carry lights, and its failure to do so constitutes such negligence as will prevent its owner from recovering damages sustained by reason of a collision caused by such failure. *Innis v. Steamer Senator*, 305.
3. IT IS NOT TO BE UNDERSTOOD THAT ALL VESSELS SHOULD SET A GUARD or exhibit lights, but only such as are moored or anchored in "harm's way." *Id.*
4. OWNERS OF VESSEL ARE LIABLE for damage to goods caused by improper stowage. *Montgomery v. Ship Abby Pratt*, 562.
5. VESSEL SUPPLIED WITH PROPER VENTILATORS is not liable for damage to goods caused by "sweating of the hold." *Id.*
6. GOODS RECEIPTED FOR IN GOOD ORDER found to be in a damaged condition at the end of the voyage renders the vessel liable, unless it can be shown that the damage resulted from the act of God, inevitable accident, or the public enemies. *Id.*

See INSURANCE—MARINE.

SISTER STATES, JUDGMENTS OF.

See JUDGMENTS, 42-45.

SISTER STATES, STATUTES OF.

See STATUTES, 1, 2.

SLAVERY.

See CRIMINAL LAW, 30.

SOVEREIGNTY.

See JURISDICTION, 2.

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE OF CONTRACT CONTRAVENTING DESIGN AND POLICY OF LAW will not be decreed. *Dial v. Hair*, 179.
2. CONTRACT BY WHICH DEFENDANT WAS TO TAKE POSSESSION OF QUARTER-SECTION OF PUBLIC LAND, to occupy it until he became entitled to a pre-emption, and on obtaining a title from the government which was paid for by the plaintiff, to make a title of one half to the plaintiff, is illegal, and if, in pursuance of the agreement, the defendant enters into possession and obtains title, equity will not decree a specific performance in favor of the plaintiff. *Id.*
3. POWER OF EQUITY TO DECREE DELIVERY OF CHATTELS is limited to chattels having special or peculiar value, or where damages would be inadequate. *Womack v. Smith*, 51.

4. PAROL AGREEMENT PART PERFORMED OR EXECUTED WILL NOT BE SPECIFICALLY ENFORCED, unless the contract be established by competent proofs to be clear, definite, and unequivocal in all its terms. *Haxellon v. Putnam*, 158.
5. SPECIFIC PERFORMANCE WILL BE REFUSED WHERE THERE IS NO AVERMENT OF PERFORMANCE, or offer to perform. *Garretson v. Vanloon*, 492.

STABLES.

See NUISANCE, 4, 6.

STARE DECISIS.

See JUDGMENTS, 14.

STATUTE OF FRAUDS.

SALE AND CONVEYANCE OF REALTY CAN BE PROVED ONLY BY DEED. *Marcy v. Stone*, 736.

See AUCTIONS, 1; LICENSES, 5, 7.

STATUTE OF LIMITATIONS.

1. STATUTE OF LIMITATION DOES NOT BEGIN TO RUN AGAINST INDORSEES of promissory note, payable on demand, until the expiration of a reasonable time after he receives the note within which he may make demand and give notice. *Mudd v. Harper*, 644.
2. WHERE DEFENDANT PLEADS TOTAL FAILURE OF CONSIDERATION, and alleges a parol warranty of property for which a note was given, plaintiff can not avoid the defense by insisting upon the statute of limitations. *Morrow v. Hanson*, 346.
3. PLEAS TO COMMON COUNTS FOR WORK AND LABOR ARE IDENTICAL where one is that defendant did not within five years, etc., before the commencement of the suit, promise, etc., and the other, that the causes of action did not accrue within five years, etc., and the latter may be rejected. *McKinney v. Springer*, 470.
4. STATUTE OF LIMITATIONS DOES NOT BAR ANY ITEMS OF WORK DONE AND MATERIALS FURNISHED in continuation of an entire contract, if some portion of the same was done or furnished within the period of the statute, although other portions may have been done or furnished before that time. *Id.*
5. STATUTE OF LIMITATIONS HAVING RUN AGAINST EXECUTOR, ADMINISTRATOR, OR OTHER TRUSTEE of the personal property of an infant, the infant is also barred. *Worthy v. Johnson*, 393.
6. LIMITATION DOES NOT EXTINGUISH CONTRACT, but is a defense in bar to a recovery upon it, and must always be pleaded. *Wassell v. Reardon*, 245.
7. LIMITATION—REVOCATION OF POWER.—A power of attorney to confess judgment upon a note was not exercised until the statute has run against the note: *Held*, that as the limitation does not extinguish the subject-matter the power was not revoked. *Id.*
8. TRUE OWNER OF PROPERTY MUST ENTER UPON POSSESSION of the same within the statutory period (seven years in Georgia), or his entry will be barred. *Beverly v. Burke*, 351.
9. PROMISE TO PAY NOTE BY ONE OF THE JOINT AND SEVERAL MAKERS be-

- fore the statute of limitations had operated as a bar takes the case out of the statute as to the other joint and several promisors. *Cox v. Bailey*, 358.
- See ADVERSE POSSESSION, 4; EJECTMENT, 6; INJUNCTIONS, 1; PARTITION, 3; PLEADING AND PRACTICE, 22.

STATUTES.

1. STATE ADOPTING STATUTE OF ANOTHER STATE, which has already received a known and definite construction in its courts, is presumed to adopt the construction thus given. *Ballance v. Rankin*, 412.
 2. CONSTRUCTION GIVEN BY COURTS OF SISTER STATE TO STATUTE adopted from that state, if it be consistent with the spirit and policy of the laws of the adopting state, should be accepted by the latter. *Rigg v. Wilton*, 419.
 3. IF STATUTE CONFERS SPECIAL PRIVILEGES, AND PROVIDE PARTICULAR REMEDY for their invasion, those neglecting that remedy may be without redress for the invasion. *Bassett v. Carleton*, 605.
- See CONSTITUTIONAL LAW; EQUITY, 2; EVIDENCE, 2; EXECUTIONS, 17; HIGHWAYS, 7; INTEREST, 2; INTOXICATING LIQUORS; JUDGMENTS, 10; LIENS, 1, 4; MARRIED WOMEN, 2; PLEADING AND PRACTICE, 1, 2; USURY, 1, 6; WATERCOURSES, 2; WILLS, 1-3.

STOCK.

See PARTNERSHIP, 13.

STOWAGE.

See SHIPPING, 4-6.

STREETS.

See CORPORATIONS, 9; COVENANTS, 1; HIGHWAYS; INJUNCTIONS, 5.

SUBPOENAS.

See NEW TRIAL, 1.

SUMMONS.

See JUDGMENTS, 23.

SUPERSEDEAS.

See PLEADING AND PRACTICE, 11.

SURETYSHIP.

1. SURETY HAVING SATISFIED JUDGMENT WHICH HIS PRINCIPAL WAS LEGALLY BOUND TO PAY is entitled to recover judgment against him. *Pike v. McDonald*, 597.
2. ADMISSIONS OF CONSTABLE MADE AFTER HE WENT OUT OF OFFICE, and when he was not in the performance of any duty growing out of his office and connected with this transaction, are not evidence to charge his sureties. *Dennis v. Chapman*, 186.
3. SURETIES OF CONSTABLE ARE LIABLE FOR MONEY FROM SALE AFTER RETURN DAY of execution, where the levy was made whilst the execution was in full force, and by virtue of which the constable had the property in possession. *Id.*

4. SURETIES OF SHERIFF ARE LIABLE FOR MONEY COLLECTED BY HIM AFTER RETURN DAY of the execution, but while he had property of the defendant in execution in possession by virtue of a levy made when the execution was in full force. *Evans v. The Governor*, 172.

See USURY, 3.

SURPRISE.

See NEW TRIAL, 2.

SWEATING.

See SHIPPING, 5.

TAXATION.

1. ALIEN PASSENGER TAX PAID UNDER PROTEST UNDER LAW AFTERWARDS DECLARED UNCONSTITUTIONAL, but which had previously been held valid, such payment being made in settlement of a suit to recover penalties for non-payment, in which the plaintiff's vessel has been attached, is not deemed to have been paid under compulsion, and can not be recovered back. *Benson v. Monroe*, 716.
2. STATE MAY IMPOSE UPON CORPORATIONS OF OTHER STATES TAX for the privilege of carrying on their business within it, although no equivalent burden is imposed upon its domestic corporations. *Commonwealth v. Milton*, 522.
3. ORDINANCE PASSED BY CITY, UNDER AUTHORITY OF LEGISLATURE, TAXING INSURANCE COMPANIES is not invalid because it exempts a particular company from the payment of the tax, where such ordinance recites a sufficient consideration for the granting of such exemption. *Id.*
4. ASSESSORS ARE NOT SERVANTS OR AGENTS OF TOWN OR PARISH so as to be civilly liable to such town or parish for neglect of duty. *First Parish v. Fiske*, 755.
5. PARISH ASSESSORS ARE NOT LIABLE TO PARISH FOR NEGLIGENCE TO ASSESS the full tax voted by the parish, where they act in the *bona fide* belief that they are performing their duty; so especially, where the tax, if assessed, would have been illegal. *Id.*
6. TAX ASSESSED BY ASSESSORS NOT SWORN as required by law is illegal. *Id.*
7. PARISH ASSESSORS ARE NOT LIABLE TO PARISH FOR NEGLIGENCE TO QUALIFY by taking the oath required by law. *Id.*

TENANTS.

See LANDLORD AND TENANT.

TENANTS IN COMMON.

See CO-TENANCY.

TENDER.

See USURY, 6.

TERRITORIAL COURTS.

See JUDGMENTS, 1.

TIME.

DAY WILL NOT BE CONSIDERED UNIT OF TIME to the prejudice of the rights of parties, and the very point of time when an act was done may be inquired into. *Craig v. Godfroy*, 299.

See **CONTRACTS**, 3-5; **CRIMINAL LAW**, 11, 12; **NEGOTIABLE INSTRUMENTS**, 6, 9, 13, 17, 18; **RAILROADS**; **STATUTE OF LIMITATIONS**, 1.

TORTS.

See **ASSUMPSIT**; **BANKRUPTCY AND INSOLVENCY**, 1; **HUSBAND AND WIFE**, 5; **MARRIED WOMEN**.

TRADE NAMES.

1. **CARRIAGE PROPRIETORS AUTHORIZED TO USE HOTEL NAME AS BADGE** on their carriages and the caps of their drivers, under an agreement with the hotel owner, whereby they have the privilege of carrying passengers to and from the house, have the exclusive right to the use of such name to indicate that they have the patronage of the house in transporting passengers, and may, without proof of special damage, maintain an action against one who uses the same badge, for the purpose of falsely holding himself out as having such patronage, in order to divert custom from the plaintiffs. *Marsh v. Billings*, 723.
2. **DAMAGES FOR DIVERTING PLAINTIFFS' CUSTOM IN SUCH CASE** are not to be confined to the loss of such passengers as the plaintiffs can prove have actually been diverted from their carriages, but the jury are to allow such damages as upon the whole evidence they are satisfied that the plaintiffs have suffered in loss of business by such injurious act. *Id.*

TRANSCRIPT.

See **EVIDENCE**, 4.

TRESPASS.

1. **LIABILITY OF TRESPASSERS IS JOINT AND SEVERAL**; the plaintiff may proceed against all or any one at his election, and judgment without satisfaction against one is no bar to an action against the others. *Blann v. Crocheron*, 203.
2. **TRAVELER GOING FROM HIGHWAY UPON ADJOINING LAND FROM NECESSITY**, because the highway is made temporarily impassable by snow-drifts, is not guilty of trespass if he does no unnecessary damage. *Campbell v. Race*, 728.
3. **WHEN INVASION OF RIGHT IS ESTABLISHED, LAW GIVES NOMINAL DAMAGES**, although no actual damage be shown. But damages will not be given for a trespass to personal property when no unlawful intent, or disturbance of a right or possession is shown, and when not only all probable but all possible damage is expressly disproved. *Paul v. Slason*, 75.
4. **OFFICER IS NOT LIABLE IN TRESPASS FOR USING PITCHFORK OF DEBTOR** in attachment for the purpose of removing certain hay and grain attached by him, where, after the removal, he leaves the fork where he found it, and does it no injury. The maxim *De minimis non curat lex* is peculiarly applicable in such a case. *Id.*

6. DOCTRINE THAT OFFICER BECOMES TRESPASSER AB INITIO when he abuses the authority given him by law, has never been extended to any case, except where there has been a clear, substantial violation of the plaintiff's rights, and of such a character as to show a wanton disregard of duty on his part. *Id.*
8. OFFICER IS NOT LIABLE AS TRESPASSER AB INITIO FOR USING personal property attached by him, unless it has been injured by him, or been used by him for his own benefit, or for the benefit of some person other than the debtor. *Id.*
7. PLEA DEFENDING ALLEGED TRESPASS ON GROUND OF APPLICATION FOR ISSUANCE OF CA. SA. is bad, when it omits to allege the due issuance of the ca. sa., and the arrest and imprisonment of plaintiff by virtue thereof. *McDonald v. Wilkie*, 423.
9. PLAINTIFF IN TRESPASS QUARE CLAUSUM FREGIT NEED NOT MAKE NEW ASSIGNMENT where the defendant pleads the general issue of not guilty to the whole trespass alleged, with or without a brief statement, under the provisions of the statute; but he may give evidence of any act of trespass covered by his declaration. *Palmer v. Dougherty*, 636.
9. TRESPASSER WILL NOT BE PERMITTED to make the person trespassed against his debtor for improvements made without the consent and against the will of the latter; neither will the trespasser be allowed to set them off against damages to which he has subjected himself by reason of his trespass. *Beverly v. Burke*, 351.
10. COURT HAS NO RIGHT TO ASSUME that parties to an action are trespassers, as that is a question of fact for the jury. *Id.*

See INJUNCTIONS, 6; LICENSES, 2.

TROVER.

1. POSSESSION IS SUFFICIENT EVIDENCE OF TITLE TO ENABLE PLAINTIFF TO MAINTAIN TROVER against a wrong-doer, although the title to the chattel may not be in the plaintiff but in another; and if the defendant would protect himself by showing an outstanding title in another, he must connect himself with it by showing that he acted under the authority of him who was in fact the owner. *Louremore v. Berry*, 188.
2. POSSESSOR OF PROMISSORY NOTE MAY MAINTAIN TROVER for its conversion, although the legal title to the note and the right to sue for the money due thereby is in the payee. *Id.*
3. TROVER WILL NOT LIE FOR VALUE OF NOTE PAID BEFORE CONVERSION, or in any manner legally discharged, for in fact it would have no value; but if the word "paid" was written across the face of the note by mistake, or by one without authority, this would not discharge the maker from his obligation to pay, and consequently trover would lie for its conversion. *Id.*
4. IF ONE JOINT OWNER OF CHATTEL SELLS ENTIRE CHATTEL, IT IS CONVERSION for which trover lies. *Perminster v. Kelly*, 177.
5. AGENT OF ONE JOINT OWNER SELLING ENTIRE CHATTEL IS GUILTY OF CONVERSION, whether he had notice of a co-tenant's rights or not, and is liable to an action of trover by a co-tenant, where neither negligence nor any fault whatever is imputable to the plaintiff. *Id.*

See AUCTIONS, 3; EXECUTIONS, 25, 26.

TRUSTS AND TRUSTEES.

TRUSTEE MAY BRING ACTION AS TRUSTEE which he would be estopped to bring in his individual capacity. *Worthy v. Johnson*, 393.

See ADVERSE POSSESSION, 4; EXECUTIONS, 10; EXECUTORS AND ADMINISTRATORS, 6; JUDGMENTS, 9, 10; MORTGAGES, 6; PARENT AND CHILD, 2; STATUTE OF LIMITATIONS.

UNITED STATES CIRCUIT COURTS.

See EXECUTIONS, 19, 20; JUDGMENTS, 23, 25, 26; JURISDICTION, 6.

UNITED STATES MARSHALS.

See EXECUTIONS, 19, 20.

USAGES.

See INSURANCE—FIRE, 6; WATERCOURSES.

USURY.

1. FORM OF ACTION IN ASSUMPSIT TO RECOVER BACK USURY, given by the statute to the party who has paid it, is no less a mode of redressing an injury caused by personal wrong and oppression, than if the action sounded wholly in tort. *Nichols v. Bellows*, 85.
2. RIGHT TO SUE FOR USURY PAID BY BANKRUPT does not vest in his assignee. *Id.*
3. IN ACTION TO RECOVER BACK MONEY PAID AS USURY ON NOTE signed by the plaintiff and by several others as sureties, one of such sureties is a competent witness for the plaintiff, notwithstanding he may have agreed to indemnify another surety against the note. *Id.*
4. PAYMENT OF USURY ON NOTE OPERATES IN LAW AS PART PAYMENT of the note, where the security on which the payment is made includes both the loan and the stipulated usury. But when separate securities are given for the usury, whether at the time of the negotiation of the loan or afterwards, and the usury, when paid, is applied on such securities, the debtor is at liberty to treat such a payment as having no connection with the legal demand, and bring his action to recover it back. *Id.*
5. IF BORROWER PAYS UP AMOUNT OF USURIOUS DEBT TO LENDER, and afterwards sues to recover it back in an action for money had and received, he can only recover the usurious excess, and no more. *Zeigler v. Scott*, 395.
6. USURY—CONSTRUCTION OF ACT OF LEGISLATURE.—An act of the legislature provided that in an action at law the adverse party may be compelled to answer interrogatories upon oath; and when so answered, they may be used as evidence, as if procured upon a bill in chancery for discovery: *Held*, that in order to support the defense of usury by such answers, it is not necessary to tender the principal and legal interest. *Id.*

VENDOR AND VENDEE.

1. COST OF CONVEYANCE FALLS UPON PURCHASER in the absence of an agreement. *Winter v. Jones*, 379.
2. COLOR OF TITLE IS WRITING professing to pass title, but which does not do it, either from a want of title in the person making it or from the defective conveyance that is used. *Beverly v. Burbe*, 351.

3. **CONDITION IN GRANT OF LAND THAT CONVEYANCE SHALL BE VOID** if subsequent payment be not made according to the terms thereof is a condition subsequent, and the fee vests in the grantee upon the delivery of the deed, although it reserves towards such payment a lien on the lumber which the grantee may take from the land conveyed; and until entry for condition broken, the title to the land remains vested in the grantee. *Spofford v. True*, 621.
4. **WHERE GRANTOR OF LAND GIVES TO GRANTEE RIGHT TO CUT LUMBER** thereon, without limitation as to the person who may do it, subject to a lien thereon for the payment of the purchase money of the land, the lumber may be lawfully removed from the land by persons who have contracted with the grantee for getting it out, and the grantor will be regarded as having fully authorized such contract. *Id.*
5. **LIEN RESERVED IN GRANT OF LAND UPON LUMBER** which the grantee may cut thereon is postponed to the lien given by the statute to laborers who have aided him in getting it out. *Id.*

See COVENANTS, 1; ESTOPPEL, 2; FRAUDULENT CONVEYANCES; NOTICE; STATUTE OF FRAUDS.

VENUE.

See PLEADING AND PRACTICE, 1-3.

VERDICT.

See CRIMINAL LAW, 6-8; JURISDICTION, 10-13; JURY AND JURORS, 1, 4-6, 12.

VESSELS.

See SHIPPING.

VOID AND VOIDABLE JUDGMENTS.

See JUDGMENTS, 8, 11, 12, 14, 18, 20-23.

WAIVER.

See ASSUMPT; ATTORNEY AND CLIENT, 4; PLEADING AND PRACTICE, 1, 2, 8, 26, 28.

WARRANTS.

See CRIMINAL LAW, 14, 16, 17, 20.

WARRANTY.

See ESTOPPEL, 1; INSURANCE—FIRE, 2-4, 7, 8; SALES; STATUTE OF LIMITATIONS, 2.

WATERCOURSES.

1. **RIPARIAN PROPRIETOR SUBSTANTIALLY DIVERTING WATERCOURSE**, by so doing encroaches on the rights of a proprietor below, who may maintain an action for the diversion, although he sustains no present damage thereby. *Newhall v. Ireson*, 790.
2. **LEGISLATIVE ACT AUTHORIZING CONSTRUCTION BY RIPARIAN PROPRIETOR** of a pipe or culvert to convey a watercourse along and across a highway does not affect the rights of a proprietor below to maintain an action for diversion thereby. *Id.*

3. **PUBLIC HAVE, BY COMMON LAW, GENERAL RIGHT OF FISHING IN SEA AND ARMS** thereof, wherever the tide ebbs and flows, which right is not affected by any grant of the soil, nor can it be abridged by a private grant from the sovereign of an exclusive right of fishery to an individual, unless it be an ancient grant, though it is subject to legislative control. *Weston v. Sampson*, 764.
4. **RIGHT OF TAKING SHELL-FISH IS INCLUDED IN PUBLIC RIGHT** of fishing in tide-waters whether such shell-fish are imbedded in the soil or lie upon its surface. *Id.*
5. **PUBLIC RIGHT OF FISHERY IN SEA AND ITS ARMS WAS EXTENDED TO COLONISTS** in Massachusetts under the charters from the crown. *Id.*
6. **MASSACHUSETTS COLONY ORDINANCE OF 1641 EXTENDING UPLAND OWNER'S RIGHT** to the soil on tide-water to low-water mark applies, by long usage, to lands in the old Plymouth colony. *Id.*
7. **RIGHT OF DIGGING CLAMS BETWEEN HIGH AND LOW-WATER MARK** on tide-waters does not belong exclusively to the owner of the upland under the Massachusetts colony ordinance of 1641 so as to render other persons inhabitants of the town liable to him in trespass for digging clams there. *Id.*

See PUBLIC LANDS, 2.

WAYS.

See EASEMENTS, 5.

WILLS.

1. **BURDEN OF PROOF IS ON PARTY AFFIRMING EXECUTION AND VALIDITY** of will, and he is entitled to open and conclude the case in the trial of an issue out of chancery, under revised statutes, chapter 109, section 6. *Rigg v. Wilton*, 419.
2. **CERTIFICATE OF OATHS OF WITNESSES AT PROBATE OF WILL** may be offered in evidence by either party in the trial of issue out of chancery to determine the validity and execution of a will, under revised statutes, chapter 109, section 6; but it is to receive such weight only as the jury may think it deserves, in connection with the other proof in the case, for such trial is *de novo* without regard to the fact of previous probate. *Id.*
3. **SIGNATURE BY TESTATOR OR BY SOME ONE IN HIS PRESENCE**, and by his direction and attestation in his presence by two or more witnesses, are indispensably requisite to the due execution of a will under the statute. *Id.*
4. **AS TO SANITY OR CAPACITY OF TESTATOR, NO PARTICULAR QUANTUM OF EVIDENCE** is necessary on the trial of an issue out of chancery, but the jury hear the proofs of the parties, and decide the issue like any other question of fact according to the weight of the evidence. *Id.*
5. **SUBSCRIBING WITNESSES NEED NOT CONCUR IN TESTIFYING TO CAPACITY OF TESTATOR** on the trial of an issue out of chancery, and the will may be established even against their testimony, and the party sustaining the will is not bound to call them, although a failure to do so, unexplained, might be regarded as a suspicious circumstance. *Id.*
6. **DEVISE OF REMAINDER OF TESTATOR'S "ESTATE"** operates as a devise of the realty. *Palmer v. Dougherty*, 636.

7. **UNDER BEQUEST TO CLASS, SUBJECT TO INCREASE OR DIMINUTION** by reason of future births or deaths, the entire interest vests in such persons only as fall within the class at the date of distribution. *Womack v. Smith*, 51.

See EVIDENCE, 26, 27.

WITNESSES.

1. **PARTY OBJECTING TO COMPETENCY OF WITNESS** must prove the existence of the interest which he claims to render the witness incompetent. *Hamilton v. Summers*, 509.
2. **WITNESS'S UNDERSTANDING AS TO WHAT LAND CONVERSATION REFERRED** to where he testifies to hearing the plaintiff say that he had received pay "for the land," the question not being limited to his understanding from the conversation itself, the whole of which is given, is inadmissible. *Marcy v. Stone*, 736.

See CRIMINAL LAW, 41, 42; EVIDENCE, 23; JURY AND JURORS, 13, 14; NEW TRIAL, 1; USURY, 3; WILLS, 2, 3, 5.

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